jurisdiction over section 1983 suits. Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572 (1976). Puerto Rico is a state for the purposes of section 1983. Berríos v. Inter. Amer. University, 535 F. 2d 1330, 1331 n. 3 (1st Cir. 1976). Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983, West Group, Fourth Edition, 2000, pp. 1-82, 1-87.

The very purpose of section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial". Id., p. 1-6, quoting from Mitchum v. Foster, 407 U.S. 225, 238-239 (1972).

On November 2, 2004, Puerto Rico held general elections, in which all elective positions within the Commonwealth were at stake. The night of the elections, the people of Puerto Rico witnessed the electoral event, in which many irregularities were observed, indicating electoral fraud in favor of the Popular Democratic Party candidate for the governorship, Aníbal Acevedo-Vilá, and violation of federal electoral and civil rights laws.

The present case clearly illustrates the type of situation that occurs in close elections, during which government officials and the Courts, when confronted with controversy, set aside the established and well-known rules and procedures involved in the counting, tabulating and adjudication of ballots, and replace them with new, surprising rules, standards and remedies, created and developed in the nick of time, without any concern as to their uniformity, objectivity and compliance with applicable federal law and constitutional considerations.

The main error of the Puerto Rico Supreme Court lies in the application of the "voter intent" criteria to establish the validity of the double votes ("pivazos"), while ignoring

federal case law and legislation applicable to a ballot in which a federal position is involved, as is the case of the state ballot in question, which includes the position for the Resident Commissioner.

In doing so, the Court not only ignored the law, but also the fundamental rights of the participants in the case, and of those close to one million American citizens residing in Puerto Rico, like t' : Petitioners, who cast their votes according to the instructions, and have seen their votes diluted, in favor of a candidate different to that of their choice, and who represent the majority of voters in the Island.

Thus, the Puerto Rico Supreme Court's decision violates federal electoral law, the U.S. Constitution, and has generated controversy, suspicion, and total lack of confidence in the electoral and judicial processes, within the majority of the Puerto Rican population.

Petitioners are bona fide members of the New Progressive Party, firm believers and followers of the pro-statehood movement in Puerto Rico, who voted according to the specified instructions included in the ballots, thus, voting for only one (1) candidate for each position included in those ballots.

Irregularities in the 2004 election process include, among others, negotiations to provide benefits to inmates in exchange for their votes, efforts to single out correctional officers who belong or were perceived to belong to the pro-statehood movement, to keep them from witnessing the process by which inmates voted, forcing inmates to vote openly, in favor of Aníbal Acevedo-Vilá; counting ballots in which known dead electors "voted", counting votes in which irregular marks were made, with questionable red ink pens which are only used during the scrutiny process, and the validation, adjudication and counting of thousands of null and void ballots containing double votes, in violation of local

and federal laws, including the newly approved Help America Vote Act, and the "one man, one vote" doctrine.

The double votes referred to above, are votes cast in the state ballot, in which voters were to vote for the candidates for the governorship and the federal position of Resident Commissioner, **a member of Congress.**

The instructions in the state ballot clearly state that you can only vote for one candidate per position, and there are only two (2) positions in it. Each main political party in Puerto Rico included one candidate for governor, and one candidate for Resident Commissioner in the state ballot, while there is a blank column in which electors can write-in other candidates for those positions.

Approximately- seven thousand (7,000) ballots were deemed valid and counted, in which voters made a valid mark ("X") under the political party insignia of their choice (the majority cast under the Puerto Rican Independence Party insignia), and then went on to mark an "X" next to the names and photos of the candidates for governor and Resident Commissioner of a different party. These ballots are decisive in the final result of the elections, which was one of the closest gubernatorial races in Puerto Rico history.

The Puerto Rico State Elections Commissions decided these votes were valid mixed or split votes, and ordered them counted and adjudicated.

Members of the New Progressive Party filed a federal lawsuit in the U.S. District Court for the District of Puerto Rico, based on these and other issues. While the case was being considered at the U.S. District Court for the District of Puerto Rico, a group of four (4) alleged voters, filed a Declaratory Judgment lawsuit at the Puerto Rico Court of First Instance, seeking declaratory judgment as to the validity of said votes, even though the issue had been resolved at the Commission level in a manner favorable to them. (case of *Manuel Suarez v. Comisión*, 2004 T.S.P.R. 179, 2004 J.T.S.

206, 163 D.P.R. ____ (2004)).

After dismissal of the case at the Court of First Instance, due to lack of subject matter jurisdiction, and the controversy being non-actionable, the Plaintiffs in that case filed a Certification brief at the Puerto Rico Supreme Court alleging the lower court had erred in dismissing the complaint.

On November 20th, 2004, the Puerto Rico Supreme Court, in a 4-3 split decision, declared those votes qualified as a valid split vote (hereinafter referred to as "Pivazos") and, therefore, ordered them to be counted and adjudicated as such. The decision was **purportedly** based on the Court's interpretation of state electoral law alone, and stated that the Commission was to interpret the "pivazos" as a mixed vote, in which the voters had the *"intent"* of keeping the Puerto Rican Independence Party registered as a principal political party, while voting for the candidates of the Popular Democratic Party for Governor and Resident Commissioner. Thus, the Supreme Court adopted the "voter intent" position in the analysis of whether those ballots were valid or not, even though nothing in the instructions of that ballot could be used to infer that a voter could register a political party by making a mark under it's insignia, AND still vote for candidates of a different party by making individual marks next to their names and photos.

Three (3) of the Supreme Court Judges issued dissenting Opinions, due to the irregularity of the decision and the process by which it was obtained, without going into the merits of the controversy. Meanwhile, on or about December 15, 2004 the case at the U.S. District Court for the District of Puerto Rico was dismissed due to lack of jurisdiction. Rosselló-González v. Calderón, 398 F. 3d 1 (1st Cir. 2004). This decision was troubling, to say the least, from a *stare decisis* point of view. Felder v. Casey, 487 U.S. 131, 139 (1988); Patsy v. Board of Regents of State of Fla., 454 U.S. 496, 517 (1982)(Justice White, concurring); Kercado-Melendez v. Aponte-Roque, 829 F.2d 255, 259-262 (1st

1987). The members of the New Progressive Party did not appeal the ruling issued by the president of State Elections Commission, filing instead before the Federal District Court, in accordance with the warning of Partido Nuevo Progresista v. Barreto Perez, 639 F.2d 825, 826 n. 2 (1st Cir. 1980), in which the now Hon. Associate Justice Stephen Breyer was part of the panel:

"As an intervenor in the Puerto Rico Supreme Court case, the PNP is arguably barred by the doctrine of res judicata from litigating the constitutional claim". See Lovely v. Laliberte, 498 F.2d 1261, 1263 (1st Cir.), cert. denied, 419 U.S. 1308, 95 S.Ct. 526, 42 L.Ed.2d 316 (1974)."(emphasis added)

The recount and general canvassing continued until Dec. 28th, 2004, when final results were announced and Popular Democratic Party candidate Aníbal Acevedo-Vilá was certified as winner of the gubernatorial election.

On January 11, 2005, Petitioners filed a lawsuit at the Puerto Rico Court of First Instance, entitled *Petition for Review and Challenge of the Certification of Election to the Office of Governor* in which they request the court to review the decisions made at the Elections Commission, regarding the allegations of fraud and other irregularities described above, and the certification of Mr. Vilá, based on violations of the Puerto Rico Electoral Law, the Puerto Rico and United States Constitutions, the Civil Rights Act, the Help America Vote Act, the Voting Rights Act, and the "one man, one vote" doctrine, as interpreted in the *Bush v. Gore* case.

On January 18th, 2005, a hearing was held to discuss the case and Motions to Dismiss filed by three (3) of the five (5) Respondents, after all had been duly notified and served with process. Present at the hearing were legal representatives of the Commonwealth of Puerto Rico, The Puerto Rico Electoral Commission, represented by Aurelio Gracia (President), and Commissioner Gerardo Cruz, of the Popular

Democratic Party. Commissioners for the Puerto Rican Independence Party and New Progressive Party, Juan Dalmau and Tomás Rivera Schatz did not appear or participate in the proceedings, even though they had been properly served and notified.

The hearing was continued until January 20th, 2005, when the parties had the opportunity to argue the Petition, Motions to Dismiss, and Opposition to Motions to Dismiss, at which time the Court recessed and took the matter under advisement.

On January 24th, 2005, Petitioners filed a *Request for Intervention* on the Manny Suarez case, and a *Request for Release of Judgment* with the Puerto Rico Supreme Court, both of which were denied on January 25th, 2005, with a brief note as to Judge Rivera's dissenting opinion expressing he would have granted both the Intervention and Release of Judgment, due to the fact that he considers the original judgment null. On January 31st, 2005, the Court of First Instance issued and notified a six (6) page Judgment dismissing the case and imposing $2,000.00 in attorney's fees to each Petitioner, which amounts to $10,000.00, stating the case was clearly frivolous and unjustified, because the Petitioners, as bona fide voters, do not have a right under state electoral law, to challenge the election results for the governorship.

On February 10th, 2005, Petitioners filed a Writ of Certiorari at the Puerto Rico Court of Appeals, for the District of San Juan, requesting a review of the decision made by the Court of First Instance.

A Certification of the matter was requested and filed with the Puerto Rico Supreme Court on March 4th, 2005. On March 16, 2005, the Appeals Court issued Judgment, which was notified on March 17th, 2005, in which the Judgment of the Court of First Instance is affirmed. On April 22nd, 2005, the Puerto Rico Supreme Court issued a decision on the

Certification filed by the Petitioners, denying the petition.

ARGUMENTS

The present case is based on the right of voters to challenge election results brought about by illegal actions and electoral fraud with respect to numerous votes which could determine the final results of the election. The laws of the Commonwealth of Puerto Rico and other federal laws cited below, provide voters with the right to pursue the present action, with both federal and local courts having concurrent jurisdiction over the matter.

Due to the presence of electoral fraud, it is understood that the administrative decisions made during the election process cannot be binding on the Petitioners, since it is an established principle of law that fraud cannot generate or terminate rights. In addition, some of the irregularities and fraudulent actions described below were never decided or reviewed on their merits, even when contained in Sworn Statements, testimony under oath and other documents, whose witnesses deserved the opportunity to be heard at a full evidentiary hearing, in which the facts of the case are determined by a fair and impartial court.

Petitioners base the following action under the provisions of the Fourteenth Amendment of the Constitution of the United States of America, Article III, Section 2 of the Constitution of the United States, the following applicable federal laws:

A) Civil Rights Act of 1964, as amended, 42 U.S.C.A. Section 1973i, 1983 and any other applicable sections;

B) Help America Vote Act, Public Law 107-252, Sections 301(a)(1) and 302.

President Aurelio Gracia issued the Certification after the voting, re-count and general canvass process had been completed, as provided for in the law. Said voting, re-count and general canvass processes were clouded by a series of irregularities, violations of electoral law, and the HELP

AMERICA VOTE ACT (HAVA) [1], which were not investigated properly, and resulted in arbitrary, biased, fraudulent and politically discriminatory decisions against members of and the candidate to the governorship for the New Progressive Party, Pedro Rosselló González, validated by the political ideology of Mr. Gracia, to the detriment of the right to vote of thousands of voters, whose will and decisional power was diluted in favor of and to the benefit of one candidate who looked the other way and approved of those irregularities. All of the above was done to favor the candidate of the political party to which Gracia belongs, Aníbal Acevedo-Vilá, resulting in the legitimization, favoritism over, and implementation of a government platform different from that which clearly was favored by the people by massive voting turnout in favor of Dr. Pedro Rosselló and the New Progressive Party. The votes cast by Petitioners, as well as those of the class they seek to represent, were cast correctly, according to the instructions provided, as per the State Ballot, by voting for only one candidate to each position included therein, under the column of the New Progressive Party.

As a matter of fact, the State Electoral Commission, with the purpose of taking advantage of federal funds available through Title II of the HAVA, agreed with the US Attorney General and the Federal Commission for Electoral Assistance, created by HAVA, to implement for the November 2, 2004, elections, the instructions required by said law, with respect to the state ballot, which contains the

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[1] Created and enacted by the United States Congress after the decision issued by the U.S. Supreme Court, in the case of Bush v. Gore, supra, in which the doctrine of "one man, one vote" is affirmed and it is established that the criteria to be used to determine the validity of a vote is whether the voter complied with the instructions, and not what the voter's "intent" was.

candidacy for the congressional seat of Resident Commissioner.

When the Puerto Rico HAVA Implementation Plan was prepared, it was distributed to then governor Sila Maria Calderón, then Resident Commissioner in Washington, Aníbal Acevedo-Vilá, the legislative branch in Puerto Rico, the Electoral Commissioners, and community groups, who had the opportunity to comment on it and familiarize themselves with its content and meaning.

As part of said implementation plan, instructions were included in the state ballot on how to vote properly, which clearly do not contemplate the possibility of the elector casting a vote to register a political party, or for it to be placed in a majority or minority position, or any other classification.

A review of the instructions reveals that: "To cast a straight-ticket vote, **you make a single valid mark (X) in the blank space below the emblem of the party of your preference an you do not make any other marks on the ballot**". (Emphasis added).

To cast a mixed or split vote, the instru tions state: "to cast a split-ticket vote, **you make a valid mark (X) below the emblem of the party of your preference and you make a mark next to another candidate outside the column of your party or you write the name of another person of your preference under the corresponding position. Keep in mind that you may only vote for one (1) Gubernatorial Candidate and one (1) Resident Commissioner candidate**". (Emphasis added).

From the above it follows that we are voting for candidates, not political parties and that in the state ballot, you can only vote for one (1) candidate for Governor and one (1) candidate for Resident Commisioner. Nothing is said about the registration of political parties. It isn't reasonable to conclude that a voter could infer such results from reading

the instructions. It isn't a coincidence that said instructions are clear as to the fact that in the state ballot, you can only vote for one candidate for each position, and that they advice the voter against voting for more than one, since HAVA requires States (Puerto Rico included) that handle the election of a candidate for a federal position, as it is in the case of the Resident Commissioner, compliance with adequate notification to the voter of the consequences of voting incorrectly.

As a matter of fact, in the general instructions given to voters, as published by the Commission, the following questions and answers are provided:

b) How many ballots will I receive?

You will receive three different ballots:

- The state ballot which is white, in which you vote for the positions of Governor and Resident Commissioner

- The Legislative ballot which is cream colored, in which you will vote for Senators and Representatives

- The Municipal ballot, which is yellow, and in which you will vote for the Mayor and municipal legislators. (Our translation).

Clearly, the elector is being infomed that on the state ballot, you vote for Governor and Resident Commissioner; nothing is said about voting for a political party.

c) How many candidates can I vote for?

- In the State ballot you have the right to vote for:

-for only one candidate for Governor

-for only one candidate for Resident Commissioner (Our translation).

Again, the voter is informed that on the state ballot, he can only vote for "only one candidate" for Governor and "only one candidate" for Resident Commissioner. Nothing is said about being able to vote to register a political party.

How can I cast a straight-ticket vote?

To cast a straight-ticket vote, you make a single valid mark (X) in the blank space below the emblem of the party of your preference and you do not make any other marks on the ballot. That single mark is valid for the positions of Governor and Resident Commissioner...(Our translation).

As it may be observed, the voter is informed that the mark made in a straight-ticket vote is valid for the positions of Governor and Resident Commissioner. Nothing is said about that mark being valid to register a political party.

d) How can I cast a split vote?

If you, the voter, aside from voting under a party emblem, have preference for one or more candidates from other political parties, for one or more positions, or for an independent candidate, **you may place a valid mark (X) to the left of the name of the candidate of your preference, outside of the column for your political party**. You may also vote for other persons of your preference who do not appear as candidates, by writing their names under the corresponding position in the "Direct Nomination" column. **Take into account that you can only vote for one candidate for each position**, including only one candidate for Representative and Senator, except for the position of District Senator, for which you may vote two (2) candidates because there are two (2) positions. **Each vote specifically marked will be counted only for that candidate and not for the candidate for the same position under the political party emblem you voted for. If you vote for more than the amount of candidates to which you have the right to vote, for each position, <u>you will annul your vote for that position</u>**. In the case of municipal legislators, you will vote for the maximum amount of candidates allowed in your municipality. (Emphasis added). (Our translation).

As the Court may have noticed, reference is made to the fact that you can only vote for one candidate for each

position and the voter is advised that if he votes for more candidates he has the right to vote for, his vote will be null for that position.

This responds to the fact that the three-mark split vote was never considered by the Commission until after the general elections of November 2, 2004, when that modality came up, and the Commission, in an unprecendted move, considered and declared it a split vote, thus negatively affecting the value and balance of all those other ballots in which this modality was not used, and the opportunity of absentee voters to consider it, due to not having instructions to that effect, since the instructions on the ballot are the only resource of information the voter has, in or out of Puerto Rico, to know how to vote.

In contrast with the above mentioned instructions, the Legislative Ballot includes the following instructions:

HOW TO CAST A SPLIT VOTE:

To cast a split-ticket vote, **you make a valid mark (X) below the emblem of the party of your preference and you make a mark next to another candidate outside the column of your party or you write the name of another person of your preference under the corresponding position. Keep in mind that you cannot vote for more candidates than those indicated above. (Not more than one District Representative; not more than two District Senators; not more than one Representative At-large; not more than one Senator At-Large)**. A split ballot also results when you mark another candidate for Representative or Senator At-Large within the same political party column under which you voted, which is different from the one appearing in position #4, or the one appearing in position #10. When you cast a split vote, the vote you cast for one candidate is lost by the candidate to the same position under the party emblem you voted for. (Emphasis added). (Our translation).

From these instructions, it is evident that they refer to being able to vote for more than one candidate only when it is proper to vote for more than one, and advise the voter against voting for more than one when not allowed. Also, they refer to voting for candidates, not political parties. Notably, these instructions are different from those included in the state ballot, precisely because they were written in compliance with HAVA.

Given the circumstances of the present case, there is no doubt that during the past general elections of November 2, 204, illegal acts and violations of civil rights occurred against inmates within our correctional facilites, which should be examined and investigated by the pertinent authorities, and that this Honorable Court should allow affected persons to be subpoenaed to testify in court. Clearly, all votes cast under coercion, illegal acts and intimidation must be declared null ab initio and not adjudicated, which could affect the election results.

"Electoral fraud is *malum in se*, since it dilutes the integrity of the vote, yeast that makes our democracy grow or diminish. Avoiding it is of great uncuestionable interest...". Partido Acción Civil v. E.L.A., 150 D.P.R. 805 (2000), 2000 TSPR 61. (Our translation). See also: PSP v. Romero Barceló, 110 D.P.R. 248 (1980).

- HAVA's Section 302 states:

a -1(iii) if voter selects votes for more than one candidate for a SINGLE OFFICE .

notify the voter that the voter has selected more than one candidate for a SINGLE OFFICE on the BALLOT

(ii) notify the voter before the ballot is cast and counted of the EFFECT OF CASTING MULTIPLE VOTES for the office and

(iii) provide the voter with the opportunity to correct ballot before the ballot is cast and counted .

B. a state or jurisdiction that uses paper ballots may meet the requirements by establishing a voters education program specific to that voting system that notifies each voter of the EFFECTS OF CASTING MULTIPLE VOTES FOR AN OFFICE; AND

ii providing the voter with instruction on HOW TO CORRECT THE BALLOT before it is cast and counted (including instruction on how to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot and correct the error). (Emphasis added).

This provision does not allow any other interpretation at all other than that one is entitled to mark an X for only one candidate for Resident Commissioner on the state ballot sheet and if more than one is marked a mistake is being made and that before depositing the vote there is an opportunity to correct it and/or to even be handed a new ballot sheet to mark an x for just one candidate for Resident Commissioner.

HAVA requires that these be the minimum rules; nothing prevents the States and Territories to make them broader but not to diminish them (according to a letter from the U.S. Attorney sent to the elected officers of the United States Of America Territories: Guam, American Samoa, The Virgin Islands and the Commonwealth Of Puerto Rico.) Certainly, HAVA grants the States and territories (Puerto Rico included) the authority to uniformly define what a valid vote is and count it, according to the definition and instructions given to the voter, but said ruling requires that the minimum rights of the voter not be diminished. In this case, the definition of what a legal vote is the one that complies with the instructions and its interpretation has to be a reading according to the rules and within its parameter. An interpretation beyond the instruction is void as the voter does not expect it, for being surprising to the voter, and it violates his or her due process of law and the applicable federal case history/examination on a case-by-case basis. The United

States Supreme Court has the authority and the power to reverse (as it has done) decisions taken by state courts whose interpretations of the law deviate from the ruling stated and set forth by said forum in the case of Bush v. Gore, 531 U.S. 98 (2000).

In the instant case, we are faced with the adjudication of some votes known as "pivazos" or mixed votes with three marks, on the State Ballot sheet, which are from every point of view void, since they do not comply with the requirements of law or with the instructions printed on the ballot and the information disclosed to the voters.

The State Elections Commission and the Puerto Rico Supreme Court erred by declaring them valid, counting and adjudicating them, since the same dispenses with the instructions given to the voter, and the clear purpose of the election, which is to choose candidates for elective office or positions within the executive and legislative branches.

Much has been said about the protection of the fundamental and constitution right to exercise the right to vote, an essential part of our democratic system. To justify the adjudication of said "*pivazos*" votes, the criteria of analyzing voter intent has been used when examining said ballot sheets.

Such criterion is wrong and contrary to HAVA and the applicable jurisprudence, established at the federal forum, including the doctrine set forth by the United States Supreme Court in the case of Bush v. Gore, supra, of "one man, one vote."

HAVA, approved in 2000, applies to elections where a federal post or position of rank is involved, such as, in our case, the position of Resident Commissioner, which is a Congressional seat; the law itself extends its application to the Commonwealth of Puerto Rico in its section 902. Its purpose is to have a fair election held and have the validly cast votes counted.

In accordance with the requirements of said law, (which the State Elections Commission bound itself to comply with for the November 2, 2004 general elections) the instructions on the ballot sheets where candidates to federal positions appear must be specific, by instructing the voter on how to validly exercise his/her vote, the consequences of failing to do so, and of his or her right to be given an explanation on how to correct his or her vote if a mistake is made when voting. Failing to do so violates the due process of law of the voters, since they are not provided with an appropriate notice on how to vote correctly and the consequences of not voting correctly.

Nowhere in the State ballot or on the instructions published by the Commission, were the voters informed that they can vote to register a party in said ballot, or on how such registration can be achieved. Interpreting said instructions in that manner not only is in violation of the requirements of HAVA, but also results in the weakening or dilution of the elective power of the voters who, ignoring said interpretation, followed the instructions to the letter. In addition, those voters who voted for the "*pivazo*" would have been allowed to register two (2) parties instead of one, by adding all the votes at the end of the counting of votes and also, to vote for two (2) candidates for each office.

In fact, none of the sample ballots published by the Commission considers that possibility. On the other hand, since in the State Ballot, as we previously stated, a Federal position is included, the decision of the United States Supreme court, in the case of Vieth v. Jubilerer, 541 U.S. 267 (2004) is applicable and binding. A majority opinion was authored by J. A. Scalia, published on April 28, 2004, in which **it is determined that in Federal elections no votes are given for political parties, but rather for Congressional seats, the President or the Vice President**.

To decide otherwise would be, in addition, illegal and in violation of the Constitutional provisions of the

Commonwealth of Puerto Rico Constitution inasmuch as it is against the Federal Relations Act 600, the Constitution of the United States and federal laws. This is so because allowing [voters] to cast votes for a party is in violation of the concept of the republican form of government and the principle that only the elected candidates can hold public office. The interpretation given to the so called "*pivazo*" is in violation of the provisions of Law 600 that authorized the people of Puerto Rico to choose its officers in a democratic way and not through arbitrary interpretations about a law and regulations clear in its wording. The decision results in an encroachment on the power of the people to choose correctly its officers, by dilution of a correctly cast vote, according to the instructions, in favor of a vote never considered, explained or published in the educational advertising material used by the Commission. "Voting is a fundamental political right, preservative of all rights". Yick Wo v. Hopkins, 118 U.S. 336, 370 (1886).

It is for this reason that the decision of our Supreme Court in the case of Manuel Suárez v. the State Elections Commission, *supra*, is void and illegal. The courts do not have the authority to expand the scope of a law beyond what a fair reading of the same is, in violation of the due process of law. "We hold Florida Supreme Court interpretation of Florida Elections Law impermissibly distorted thereof beyond a just and fair reading, the interpretation was unforeseeable and as such, abridges voter's due process of law". See: Bovie v. City of Columbia, 378 US 347; Bush v. Gore, *supra*. Therefore, a Court cannot substitute its own interpretation of what the "intent" of a voter is, for the clear and unequivocal wording of the law, its regulations and the clear instructions on an election ballot. Bush v. Gore, 531 U.S. 98, 114-115 (2000) (Chief Justice Rehnquist, concurring); Board of Regents v. Roth, 408 U.S. 564, 577 (1972). "The same Constitution that guarantees the right of the people to vote, protects that right from external influences

that seek to dilute a particular citizen's vote". Winberry v. Sanders, 376 U.S. 1, 17 (1964). See also: Bennett v. Yoshina, 97-1608 (9 Cir. March 27, 1997; Roe v. Alabama, 43 F 3d 574 (11 Cir 1995).

A ballot is defective for what it does not say. The requirement of clear and unambiguous language is that voters should not be misled and that they have the opportunity to know and be on notice as to which he is to cast, the ballot must meet accuracy. Askew v. Firestone, 421 So 2nd 151 (Fla. 1982), as cited by Armstrong v. Harris, Fla Supr. Ct. 2000.

Furthermore, the decision of the Puerto Rico Supreme Court in which it was informed that the interpretation of the "intent" of a voter should be the criteria to be followed in deciding the validity of a cast vote, in substitution of the clear instructions of a ballot, is equivalent to a State Court making said instructions broader and therefore, an improper amendment of the federal law known as HAVA. "Plaintiff voters have the right that only legitimate votes be counted". U.S. v. Moskey, 238 U.S. 383 (1925). See also: Sandusky Democratic Party v. Blackwell, 387 F3d 565; U.S. v. McCraine, 169 F 3d 723; U.S. v. Bowman, 636 F 2d 1003 (5th Cir Unit A Feb. 1981).

From the instructions included in the State ballot and those explanations and definitions published by the State Elections Commission, it can be clearly concluded that the voter could NOT "infer" that a vote could be cast to register a political party of its preference by marking an X below its insignia. The instructions refer to candidates and positions and they do not say anything about the registration of parties.

On this subject, there is federal jurisprudence in the sense that the circumstances and controversies in the instant case cannot be considered as being academic, since the voters and the Petitioners, as bona fide voters, were caught by surprise in an unexpected change of the rules of the game, their rights

being weakened to cast an intelligent vote by granting validity to some votes clearly contrary to the instructions, based on a wrong and opportunistic interpretation of the voter's "intent", when it has been clearly established by the United States Supreme Court, a higher ranking court, that the rules to be followed in cases such as this one, is to ascertain whether the voter complied with the instructions. See: Roe V. Alabama, *supra*; Johnson V. Hood, 430 C 2d 610, 513 (5th Cir. 1973.)

Besides, there is federal jurisprudence in the sense that the existence of fraud in an election in which a federal candidacy is involved, although said fraud does not directly affect said candidature and its results, it is considered a federal jurisdiction matter since there is a potential that the "integrity and purity" of the election is affected, therefore, the aforementioned federal laws cited and jurisprudence are applicable to the instant case. See: U.S. V. Bowman, 636 F 2d 1003 (5th Cir, Unit A Feb. 1981; U.S. V. Cole, 41 F 3d 303 (7th Cir. 1994); 26 Am Jur. 2d Elections Section 474.

In the case of Bovie v. City of Columbia, *supra*, the United States Supreme Court reversed the Supreme Court of South Carolina, by stating that the courts have to abide by the laws as approved and that its interpretation must be within the purview of its approval. What this means for the case at hand is that if the Commonwealth of Puerto Rico wanted to register political parties by way of ballots, the State should have specified it in its instructions.

A Commonwealth of Puerto Rico court cannot apply more stringent state standards of mootness and justiciability to a section 1983 claim brought in state court if application of those standards would preclude a plaintiff's federal claim, but the application of the federal standards would not. It has not been addressed what would happen if state justiciability standards were more favorable to a section 1983 plaintiff suing in state court than federal justiciability standards would be. Nahmod, supra at pp. 1-102 – 1-103.

Contrary to federal and Puerto Rico established principles of standing and justiciability, a majority of the Puerto Rico Supreme Court issued an opinion to resolve a controversy on its merits even though the Court of First Instance (C.F.I.) had ruled that the cause was not actionable, inasmuch as the State Elections Commission (S.E.C.) President decided on November 12, 2004 that the ballots at issue were a valid split vote and should be adjudicated as such, exactly the same ruling the plaintiffs were seeking now. The lower court found that, were it to go into a discussion of the merits of the case, it would be rendering an advisory opinion. Consequently, the C.F.I. refused to act on the matter for the reasons we have already stated. Therefore, the net result of that decision was to affirm the Resolution issued by the S.E.C. In the words of dissenting Supreme Court Associate Justice Baltasar Corrada Del Río, issued on November 30, 2004:

"It is rather odd and astonishing that this Court would decide such a transcendental matter without a record from the Court of First Instance, or that it did so even after the S.E.C. had resolved the matter in favor of appellants. **This is yet another example of judicial activism that is detrimental to our democratic way of life.**" (emphasis added)

The Puerto Rico Supreme Court majority members' contempt for the rights of NPP voters deprived even members of the Court appointed by NPP governors, of a meaningful opportunity to evaluate the case, as well as deprived the defendants of a meaningful opportunity to reply the petitioners' writ. The majority granted the Writ of Certification and assumed jurisdiction in this matter, and certified the Opinion *Per Curiam* and Judgment of November 20, 2004, during the evening hours, **although it had been served with a "Notice of Removal" on November 20, 2004 at eleven forty-eight in the morning (11:48 a.m.) filed with the United States District Court for the District of Puerto Rico, intended to transfer the instant case from the Puerto Rico Supreme Court to the federal court's jurisdiction.** On that date, Friday, November 18, 2004, the

electronic research system the Associate Justices have available in their offices was not working. See dissenting opinion by Associate Justice Rivera-Pérez, issued on November 23, 2004, n. 4.

The Majority granted the State Elections Commission and the New Progressive Party Electoral Commissioner an extension until twelve at noon (12:00 p.m.) on Saturday, November 20, 2004 to state their positions in writing. The motion for extension by the State Elections Commission President was handed to the minority members of the Court after the Majority Decision was certified, granting both until Saturday, November 20, 2004 at twelve noon (12:00 p.m.) They were not able to evaluate it sooner such as to be able to offer their criteria on the matter. The minority members learned about the certification of the Decision and the existence of said motion by the State Elections Commission's President through the media, when a press conference offered by one of the members of the Court was broadcasted. See dissenting opinion by Associate Justice Rivera-Pérez, issued on November 23, 2004, n. 5. As aptly put by Associate Justice Rivera Pérez:

"Some of the defendants in the case at bar and appellees herein, during the time these matters were being processed by this court on Friday, November 19, and Saturday, November 20, 2004, were actively participating in the proceedings on the matters related to the vote canvassing process in San Juan and an evidentiary hearing scheduled for those same days and times in the United States District Court for the District of Puerto Rico, before the Honorable Judge Daniel Dominguez. We conclude that, under the present circumstances, the terms granted to the appellants to make their appearances before this Court were unreasonable and insufficient for the parties to be able to state their positions before this Court in an informed and responsible manner. **The Majority rode roughshod over these parties.** The

constitutional right to due process is not a mere formality. It is a real guarantee and has to be effectively protected. **The Majority revoked the Court of First Instance that, as we have stated, dismissed the case at bar, without the benefit of a written copy of the judgment issued by said court in order to evaluate the grounds that led to the dismissal of the instant complaint.** The case was not remanded to the original court to initiate first instance proceedings and eventually hold an evidentiary hearing. The Court evaluated the issues raised by the appellants on the merits before the court *a quo*, and not the decision to dismiss the complaint that was the object of the appeal, as it should have been done. **The Court acted without a record, and without the presentation by appellants of evidence admitted by the Court of First Instance to sustain their allegations. We conclude that this whole course of action taken by the Majority is inappropriate as a matter of law, and is in gross violation of the right to due process all appellants have under the United States and the Puerto Rico Constitutions."** (emphasis added)

"The haste, urgency and celerity with which this process was submitted to the Majority was not applied to the delivery of this document to the undersigned Justice on November 20, 2004 who was at his office until the evening hours and subsequently available at his place of residence to take care of any related matter in light of the urgency conveyed." See dissenting opinion by Associate Justice Rivera-Pérez, issued on November 23, 2004, n. 6.

As noted above, the majority granted the Writ of Certification and exercised jurisdiction in this matter although it had been served with a "Notice of Removal" filed with the United States District Court for the District of Puerto Rico. "Federal case law on 28 U.S.C.A. sec. 1446(d) clearly establishes that once a motion for removal is filed in the U.S. District Court, all adverse parties have been notified of said filing and a copy of the motion has been filed with the state

court, the latter may proceed no further; the fact that all defendants were not a party to the motion does not invalidate it, since that is not a requirement or jurisdictional defect; the decision as to the motion's validity or lack thereof is the exclusive province of the federal court; and, finally, any action or judgment by the state court subsequent to the motion for removal is null *ab initio*." See dissenting opinion by Associate Justice Rebollo-López, issued on November 30, 2004 (footnotes omitted; underlined in original):

"We are the first to admit that having a federal statute, under the particular circumstances of the instant case, which deprives us of our constitutional responsibility to interpret our laws and our Constitution, and of our primary duty to safeguard the rights of those who come before us protected by the Constitution, is not 'agreeable'.

"Our personal desires and beliefs, however, are not enough to grant jurisdiction to this Court when it does not have it. We live in a federalist system of government, a system in which federal statutes prevail over local statutes; this happens not just in Puerto Rico but also in the fifty states of the Union."

The Puerto Rico Supreme Court majority members' disdain, resistance, and hostility toward Acts of Congress and to the decisions of the federal judiciary, was further displayed when the First Circuit Court of Appeals held the following in Rosselló-González v. Calderón, 398 F. 3d 1, 9 n. 23:

"We agree with the District Court that the Supreme Court's judgment was void. The governing statute provides that the filing of 'a copy of the notice [of removal] with the clerk of [the] State court ... effect[s] the removal and *the State court shall proceed no further* unless and until the case is remanded.' 28 U.S.C. § 1446(d) (emphasis added). **The Supreme Court received notice of the removal at 11:48 a.m. on November 20, 2004 but did not issue judgment until that evening. The judgment is thus, as the District**

Court found, a nullity." (emphasis added; italics in original)

However, the Puerto Rico Supreme Court "reaffirmed" its previous decision which had been determined null by the U.S. First Circuit Court of Appeals, instead of issuing or re-issuing it.

WHEREFORE, we understand that the State Elections Commission and the Puerto Rico Supreme Court erred in its Findings of Fact and Law on each previously described case, by validating as mixed votes, the three-marks votes known as "pivazos", which are from every point of view, void, and by certifying Aníbal Acevedo-Vilá, as the winner for the candidacy of Governor of Puerto Rico. We understand that the entire process before, during and after the elections was contaminated with fraudulent actions on the part of public officials, by errors and determinations made by the Commission that depart from the Electoral Law of Puerto Rico, supra, and its regulations, and HAVA, a law that the Commission bound itself to comply with and enforce.

CONCLUSION AND PRAYER

For the reasons stated above, Plaintiffs-Petitioners request the Court to approve this Petition for a Writ of Certiorari so that 959,737 American Citizens of Puerto Rico may feel that the substantial factual allegations of fraud and irregularities in the 2004 General Elections in Puerto Rico will be reviewed under the lens of the American principles and doctrines,[2] so that we may also have faith in the American Democracy in Puerto Rico.

In San Juan, Puerto Rico, July 19th 2005

Francisco R. González-Colón

[2] Not under the lens of the Latin American ideology for the ruling of the fewest.

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Puerto Rico Gubernatorial decisive Ballot with three marks for two candidates used in November 2nd 2004 in the General Elections object of this Petition for Certiorari to US Supreme Court.

IN THE SUPREME COURT OF PUERTO RICO

Manuel R. ("Manny") Suárez-Jiménez; et als.
Plaintiffs-Appellants

v.

State Elections Commission, et als.
Defendants-Appellees

Certification CT-2004-0004

Concurring Opinion by Associate Justice FUSTER-BERLINGERI.

San Juan, Puerto Rico, on November 20, 2004.

I

A group of voters comes before us in the instant case alleging that their split votes, under the Puerto Rican Independence Party (PIP) emblem and in favor of the Popular Democratic Party Gubernatorial and Resident Commissioner candidates run the real and imminent risk of not being adjudicated. They state that the New Progressive Party (NPP) and its Electoral Commissioner have raised an objection as to the validity of the ballots from voters such as them, and that they anticipate that those votes will be declared null and, thus, may not be adjudicated.

The voters in question went before the Court of First Instance, San Juan Superior Court, and petitioned said forum for a declaratory judgment in their favor. The lower court heard the arguments by the Appellants as well as the points of view of the NPP's Electoral Commissioner. Said Court ruled in favor of the NPP Electoral Commissioner and proceeded to dismiss the case at bar without prejudice. The entry of a written judgment was left pending at that time.

Pursuant to the foregoing, Appellants came before us during the afternoon of November 18, 2004, through a Petition for Certification, under the provisions of Art. 3.002

(e) of the 2003 Judiciary Act, Public Law No. 201 of August 22, 2003, and of Rule 23 of the Rules for the Supreme Court of Puerto Rico.

During the morning of November 19, 2004, we granted all appellees an abridged term to react to the aforementioned petition for Certification. During the afternoon of that same day, we extended said term at the request of some of the parties, in order to grant them an even greater opportunity to answer the Certification at issue.

At noon on November 20, 2004, Appellant, together with the State Elections Commission itself, and the PDP and NPP Electoral Commissioners, appeared before us and stated their positions.

I coincide with Appellant's position that this case is vested with the highest public interest, as the most fundamental right of a democracy, the right to vote, is at issue. In view of that, the Court should proceed to address the issue brought before us as quickly as possible.

II

The fundamental issue that has been raised with the State Elections Commission as to the validity of the split votes in which a number of the country's voters has voted at the same time under the PIP emblem and for the PDP Gubernatorial and Resident Commissioner candidates is public knowledge. The decision made by this agency to secure those votes in separate envelopes, to be adjudicated subsequently in a final and definitive manner, is also known. The aforementioned controversy has also been the object of discussions over the course of three days before the United States District Court in Puerto Rico. Thus, there is a state of uncertainty as to the validity and effectiveness of those split votes that must be definitively resolved as soon as possible. This is strictly an issue of law under the Constitution and the laws of the Commonwealth of Puerto Rico which, according to the very decisions of the United States Supreme Court, must be

ultimately decided solely by the Puerto Rico Supreme Court. The recent decision by the Circuit Court of Appeals, precisely from the Circuit to which Puerto Rico belongs, is clearly applicable here:

> [A] federal court may not inject itself into the midst of every local electoral dispute. Election law, as it pertains to state and local lections *[sic]*, is for the most part a preserve that lies within the exclusive competence of the state courts. . .
>
> [W]ith only a few narrow and well-defined *[sic]* exceptions, federal courts are not authorized to meddle in local elections. Consequently, they normally may not superintend the step-by-step conduct of local electoral contests or undertake the regulation of "garden-variety election irregularities." Bonas v. Town of North Smithfield, 265 F. 3d 69, 74 (1st Cir. 2001).

For all of the above, and on the grounds we indicate further below, we must assume jurisdiction over this matter in order to bring it to a final and definitive resolution.

During the afternoon of November 20, 2004, the NPP Electoral Commissioner filed a motion before the Puerto Rico Supreme Court to have the petition for Certification before us removed to the Federal Court in Puerto Rico.

The removal petitioner did not make an initial request before the lower court and is now making an attempt to do so *tardily*, after the case has already been submitted to our jurisdiction.

Moreover, since this is a matter that arises exclusively under the Constitution and the laws of Puerto Rico, even assuming that the removal petitioner had a *federal defense* in its favor, it would in no way serve to authorize such removal, pursuant to what is expressly provided in the federal statute on removal, and as repeatedly upheld by the United States Supreme Court. Oklahoma Tax

Comm'n v. Graham, 489 US 838 (1989); Hernández-Agosto v. Romero-Barceló, 748 F. 2d 1 (1984); Horn v. Rural Community Ins. Servs., 903 F.Supp. 1502 (1995).

III

Puerto Rico is currently in a regrettable state of great anxiety and tension due to the events that are taking place on a daily basis at the State Elections Commission. The serious restlessness felt throughout the country is not merely the result of not yet knowing with certainty who was elected governor during last week's elections, but more particularly the result of the very process of counting the votes having been plagued with uncertainty, obstacles, and drawbacks. As we already pointed out once before on a similar occasion, our democratic system suffers when those who share the duty of conducting the electoral processes at a given point in time entertain irreconcilable partisan criteria at odds with the provisions of our legal system. Those are the times when it is particularly incumbent upon this Court to ensure faithful compliance with the Constitution and the laws. Báez-Galib v. Rosselló-González, et al. I, 147 D.P.R. 371 (1999).

The law is clear and indisputable when it comes to the Puerto Rico Supreme Court being the ultimate interpreter of the Commonwealth of Puerto Rico Constitution and laws. P.S.P. v. State Elections Commission II, 110 D.P.R. 538(1980). Evidently, that includes the interpretation and application of the electoral rules under our Constitution and laws. P.S.P. v. State Elections Commission, 110 D.P.R. 400, 429 (1980). See, also, P.D.P. v. Barreto-Pérez, 110 D.P.R. 376 (1980); P.S.P., P.D.P. and P.I.P. v. Romero-Barceló, 110 D.P.R. 248 (1980); N.P.P. v. Electoral Court, 104 D.P.R. 741 (1976); and Dávila v. Sec. of State, 83 D.P.R. 186 (1960). Above all, just as we affirmed before in a similar situation,

> **"this Court cannot lose sight of the general confusion that the close preliminary results of the general elections held in Puerto Rico have generated..." P.D.P. v. Barreto-Pérez**, *supra*, at p. 386.

During these times of great difficulty the country is undergoing given the uncertainty of the election results, the protection of what we have previously called **"the greatest postulate"** of our Constitution is crucial, that is,

> **"the democratic nature of our society is that in which the political power emanates from the People and is exercised pursuant to the will manifested in the ballot boxes."** P.S.P. v. State Elections Commission, *supra*, p. 405.

We must now proceed to examine concretely the issues before this Court's consideration.

IV

Split Vote for Governor and Resident Commissioner

The Puerto Rico Electoral Act, Public Law No. 4 of December 20, 1977, as amended, 16 L.P.R.A. sections 3301, *et seq.*, clearly envisions the **split vote** for Gubernatorial and Resident Commissioner candidates, when providing in its Art. 5.011 that all general elections shall have a ballot for Gubernatorial and for Resident Commissioner candidates, which will show

> **"the symbol of each party... with sufficient room for the voter to place a mark under said emblem and... the list of the candidates... with the name of each candidate having... sufficient space to the left for any valid electoral mark."** 16 L.P.R.A. § 3211.

Moreover, in Art. 1.003 of said Law, the term "**split ballot**" is defined as follows:

> **"Shall mean that in which the voter marks the electoral ballot to vote for any combination of candidates, individually or in combination with a mark under a party's emblem, whether or not they belong to the same party or are independent [candidates]..."**

Furthermore, the Electoral Act clearly endows the vote itself under a party's emblem with an extremely important effect. **The vote under the emblem is counted to decide**

whether or not a Puerto Rico political party is a "major party." Art. 3.001, 16 L.P.R.A. § 3101. That is, in our country the legal system recognizes two types of official parties, to wit: (1) **the parties by petition**, which are those that are officially listed when they are registered through specific petitions to that effect; (2) **the major parties**, which are those that are listed officially because they have received a given number of votes for their emblem in the preceding general elections. Id.

The vote under an emblem, then, has its own value and effect, **regardless of its significance with regards to the candidates for public office whose names also appear on the electoral ballot**. 16 L.P.R.A. § 3101.

Pursuant to the foregoing, a vote on the state electoral ballot under a party's emblem and, in turn, to the left of the name of another party's candidate for Governor and to the left of the name of another party's candidate for Resident Commissioner, **is a valid and effective split vote** favoring the registration of the party whose emblem received a vote, and also in favor of the Gubernatorial and Resident Commissioner candidates favored. Such split vote, then, has **three effects and must be counted as such in the canvassing**.

Indeed, the 2004 General Elections and General Vote Canvassing Regulations state and clearly provide that the split vote mentioned earlier is to be adjudicated exactly as we have indicated in the preceding paragraph of this Opinion. Said Regulation, in its R.81, orders the following in its pertinent part:

> R.81. Criteria to Adjudicate Split Votes in the State Ballot
>
> When a voter splits his/her vote by placing a mark within the box bearing the name of a gubernatorial candidate under a column other than the one where s/he placed the mark for a political party's emblem... the gubernatorial

candidate directly receiving such a mark wins a vote and the gubernatorial candidate listed under the party emblem for which s/he voted loses a vote.

This same criterion applies when the mark is for a Resident Commissioner candidate different from the one appearing below the emblem under which s/he voted.

Moreover, the **instructions on how to vote** that appeared in the state electoral ballot itself instructed the voter on how to issue a split vote, under the same terms that we have mentioned. In its pertinent part, the instruction was the following:

HOW TO ISSUE A SPLIT VOTE

To issue a split vote, place a valid mark (X) below the emblem for the party of your preference and place a mark next to another candidate outside of your party's column... Bear in mind that you may only vote for one (1) Gubernatorial candidate and one (1) Resident Commissioner candidate.

Finally, we must bear in mind that the State Elections Commission itself, as part of its extensive orientation to the country's voters in all mass media, disclosed the following regarding split votes:

HOW DO I CAST A SPLIT VOTE?

If in addition to voting under a party's emblem, you have a preference for **one or more candidates from other parties** for **one or more offices**. . . you may place a valid mark in the blank space that appears to the left of the name of the candidate you prefer, outside the column for your party. You may also vote for other persons. . .

In light of all of the above, it is **unquestionable** that, just as in previous elections, during the November 2, 2004 elections, the country's voters had the option of issuing a split vote in what is known as the state ballot, drawing an "X" under the emblem for the party of their preference and also voting for other parties' Gubernatorial and Resident Commissioner

candidates.

That is why it is also unquestionable that the split votes at issue in this case, known as the "pivazos," are entirely valid and must be adjudicated. This way not only do we abide by Puerto Rico's clear statutory and regulatory provisions on this subject, but we also honor the preeminent will of the voters in question, whose electoral rights hold the highest ranking in our legal system.

V

The vote recount

Appellants also ask that their split votes be adjudicated immediately during the general vote canvassing being conducted by the State Elections Commission and **prior to the possible vote recount**. It is public knowledge that some political sectors would like to **avoid** a vote recount, and trust that the PDP gubernatorial candidate will get enough votes during the canvassing so that there will be no need to implement the legal provision that requires a recount if the candidate in question has an advantage of less than .05% of the votes issued for the office of Governor.

The split votes at issue must be adjudicated as soon as possible. **But that cannot have the effect of sidestepping a vote recount. The vote recount is an unavoidable constitutional necessity**. The circumstances of the 2004 elections, being highly contested elections with very close results for the gubernatorial candidates, have given rise to a situation laden with suspicions and recriminations from both sides. No canvassing, regardless of how good it may be, will stave off the doubts and the uncertainty about who was actually elected, thus, a recount is the only means to a relative peace in the country after the elections, and to restoring the public trust in the electoral system. Today, just as in 1980 when the country faced a similar situation, we have "insecurity, restlessness, and uneasiness among the citizens who are justifiably concerned about the integrity of

the vote deposited by each voter." P.D.P. v. Barreto-Pérez, *supra*, at p. 387.

On the other hand, to postpone the recount until the conclusion of the general vote canvassing, which is now being carried out with countless hurdles, engenders an actual risk of not being able to finish the recount on time for the new Governor's inauguration on January 2, 2005, as mandated by our Constitution. If such risk were to become a reality, not only would the Constitution's ordinary procedure for the inauguration of the new Governor be undermined, but another irregular situation of critical proportions would arise, engendering more disputes and uneasiness in the country, exacerbating the existing ominous restlessness, and further shattering the public trust in our system of laws and the political processes. We cannot allow that to happen, nor to have our democratic system placed at even greater risk.

Finally, there is no doubt whatsoever that the recount is the safest way to guarantee that the will of the majority of the voters will be guaranteed, which is the greatest constitutional consideration vis-à-vis the elections.

Based on the above, just as we did previously in 1980, we proceed to order that the State Elections Commission immediately begins the vote recount. P.D.P. v. Barreto-Pérez, *supra*.

VI

Based on the above, I concur with the *Per Curiam* Opinion and the Judgment of the Court in the case at bar, whereby the State Elections Commission is instructed to proceed without delay to duly adjudicate the split votes at issue in the case at bar; and it is ordered to begin the vote recount immediately.

[signature]
JAIME B. FUSTER-BERLINGERI
ASSOCIATE JUSTICE

IN THE SUPREME COURT OF PUERTO RICO

CT-04-004 – Certification Petition

DISSIDENT OPINION BY ASSOCIATE JUSTICE RIVERA-PEREZ.

San Juan, Puerto Rico, November 23, 2004.

The majority granted the Writ of Certification and assumed jurisdiction in this matter, and certified the Opinion *Per Curiam* and Judgment of November 20, 2004, during the evening hours, although it had been served with a "Notice of Removal" on November 20, 2004 at eleven forty-eight in the morning (11:48 a.m.) filed with the United States District Court for the District of Puerto Rico, intended to transfer the instant case from this Court to the federal court's jurisdiction. A notice of transfer for a case pending before the local courts subjects the matter to the federal forum, not the local forum. The Majority acted in clear disregard of the provisions contained in 28 U.S.C. sec. 1446(d), the federal statute that regulates the aforementioned proceedings and provides for an automatic stay in state proceedings once a notice of removal has been filed in federal court and the state forum has been duly notified. The Majority acted without having jurisdiction, encroaching upon the powers of the federal court once the "Notice of Removal" was given.

Manuel R. ("Manny") Suárez-Jiménez; Enid Abreu-Zurinaga; Jose A. Álvarez-Febles; Liany Fernández-Toledo

Appellants

v.

State Elections Commission; Aurelio Gracia, President; Thomas Rivera-Schatz, NPP Electoral Commissioner; Juan Dalmau, PIP Electoral Commissioner; Gerardo Cruz, PDP Electoral Commissioner; New Progressive Party; Pedro Rosselló

Appellees

The United States First Circuit Court of Appeals, in Boston, has resolved that any order, resolution, or judgment entered by a state court in a civil matter is null when it has been certified after the matter has been removed to the federal court, pursuant to 28 U.S.C.A. sec. 1446(d), the federal statute that regulates such proceedings [1]. Any order, resolution, or judgment issued by a state court is null *ab initio* after a "Notice of Removal" has been filed in federal court, duly notified to the state court, pursuant to the aforementioned federal statute, even when the federal court eventually rules that the removal in question is unwarranted. [2]

I want to make it clear, as a threshold matter, that I DISSENT from the actions taken by the Majority because I am convinced that the federal court had jurisdiction over the instant case from the moment the "Notice of Removal" was filed in that forum, duly notified to this Court. Although I understand that the Court has no jurisdiction, I am forced to offer my position on the merits of the issues raised herein, given the requirements of Rule 5(b) of our own Rules which provide for a time limit of ten (10) days to express such a position as to the Opinion *Per Curiam* and Judgment already certified as of November 20, 2004 [3].

We do not have a **copy of the written judgment issued by the Court of First Instance** in our files, **nor a copy of the summons served on all the defendants in the case that herein being appealed**.

On November 19, 2004 the Majority granted the appellees herein until three in the afternoon (3:00 p.m.), barely three (3) hours, to state their positions on the "Petition for Certification and Motion for Urgent Remedies in Aid of Jurisdiction" filed by the appellants before this Court on November 18, 2004 at one fifty-seven in the afternoon (1:57 p.m.), and received by the undersigned at three twenty in the afternoon (3:20 p.m.)[4]. On November 19, 2004 at two thirty-nine in the afternoon (2:39 p.m.) the New Progressive

Party Electoral Commissioner requested an extension to state his position on the petition for Certification before us. He argued that he did not have a copy of the Certification petition. He was served with a copy of this Court's Order but was not provided with a copy of the appeal in question. The attorney for the New Progressive Party Electoral Commissioner alleges to have been actively and extensively participating in the advice and counsel of his client during the Friday, November 19, 2004 holiday, on matters related to the vote canvassing process in San Juan. Therefore, he alleges, preparing a brief to make his appearance before this Court and state his position was further complicated. He requested an extension until the following Monday, November 22, 2004, at five in the afternoon (5:00 p.m.) to submit his brief. On November 19, 2004 at three thirty-nine in the afternoon (3:39 p.m.) the President of the State Elections Commission filed a motion for an extension to state his position on the aforementioned appeal. He requested an extension until Saturday, November 20, 2004 at three in the afternoon (3:00 p.m.) to make his appearance in writing. He argued that at three in the afternoon (3:00 p.m.) on Friday, November 19, 2004 the Hon. Aurelio Gracia was testifying at the evidentiary hearing being held in the United States District Court for the District of Puerto Rico, and was therefore impossible for him to comply with the original term given by this Court (3:00 p.m. on a holiday, Friday, November 19, 2004). The Majority granted the State Elections Commission and the New Progressive Party Electoral Commissioner an extension until twelve noon (12:00 p.m.) on Saturday, November 20, 2004 to state their positions in writing. [5]

Some of the defendants in the case at bar and appellees herein, during the time these matters were being processed by this court on Friday, November 19, and Saturday, November 20, 2004, were actively participating in the proceedings on the matters related to the vote canvassing process in San Juan and an evidentiary hearing scheduled for those same days and

times in the United States District Court for the District of Puerto Rico, before the Honorable Judge Daniel Dominguez. We conclude that, under the present circumstances, the terms granted to the appellants to make their appearances before this Court were unreasonable and insufficient for the parties to be able to state their positions before this Court in an informed and responsible manner. The Majority rode roughshod over these parties. The constitutional right to due process is not a mere formality. It is a real guarantee and has to be effectively protected. The Majority revoked the Court of First Instance that, as we have stated, dismissed the case at bar, without the benefit of a written copy of the judgment issued by said court in order to evaluate the grounds that led to the dismissal of the instant complaint. The case was not remanded to the original court to initiate first instance proceedings and eventually hold an evidentiary hearing. The Court evaluated the issues raised by the appellants on the merits before the court *a quo*, and not the decision to dismiss the complaint that was the object of the appeal, as it should have been done. The Court acted without a record, and without the presentation by appellants of evidence admitted by the Court of First Instance to sustain their allegations. We conclude that this whole course of action taken by the Majority is inappropriate as a matter of law, and is in gross violation of the right to due process all appellants have under the United States and the Puerto Rico Constitutions.

On November 19, 2004 at four thirty-nine in the afternoon (4:39 p.m.) the Popular Democratic Party Electoral Commissioner filed a brief with this Court titled "Appearance by the Popular Democratic Party Electoral Commissioner".[6] The party in question alleges that **the plaintiffs at bar have been the victims of frivolous and unjustified arguments that contradict the basic principles of Puerto Rico's electoral laws. According to the Commissioner, the appearances in federal case No. 04-**

2251 (DRD) in federal court are evidence to that effect. The party in question states the following in his brief:

Federal plaintiffs acknowledge that the SEC[1], the entity that the Commonwealth has endowed with the power to interpret and implement the electoral law, **has ruled that the votes are and shall be counted as split votes under the Puerto Rico Electoral Act, inasmuch as they reflect the voter's intent to vote for the PIP[2] for purposes of the political party's registration while, at the same time, voting for the PDP[3] candidates for the Governor and Resident Commissioner positions.** Federal plaintiffs, however, argue that the interpretation of the law and its regulations made by the Commission is incorrect and urge the court to adopt the interpretation they propose, which would result in the annulment of thousands of votes and, as a practical consequence, would result in the disenfranchisement of those voters who trusted the law, the regulations, and the announcements made by the Commission on how to cast a split vote.

[1] State Elections Commission.

The basis for their position as to the nullity of these votes is exclusively their own interpretation of the electoral law and regulations. By asking the federal court to adopt their interpretation, federal plaintiffs are attempting to bypass this court's authority to interpret local laws, specifically as to the rights that local voters may have in Puerto Rico under Puerto Rico's electoral laws.

During the first day of hearings in federal court, the witness presented by plaintiffs in the federal case has testified that the so-called "pivazos" are null and, on their face, cannot be counted. This testimony, though lacking any foundation on electoral laws or regulations, was submitted as the testimony of an "expert" given his experience, even though the witness admitted he had never seen this type of vote prior to these

elections. The whole testimony revolved around this individual witness' interpretation of what the electoral law and regulations say, which is the role of the courts of the Commonwealth of Puerto Rico. Even more severe is the fact that the federal court has allowed, by holding a hearing on a preliminary injunction, an assortment of hearsay evidence to come in by admitting this witness' testimony to the effect that he was told by unidentified supervisors, who were told by another supervisor who had received information from persons acting as voting poll officials, to the effect that the canvassing taking place at the voting polls on the night of the elections counted votes in different ways, some as straight votes for the PIP, others as straight votes for the PDP, and yet others as split votes.

[2] Puerto Rican Independence Party.

[3] Popular Democratic Party.

...

At this time the United States District Court for the District of Puerto Rico is exercising jurisdiction over a case raising similar issues, in which a plea is being made for that court to be the one that interprets the basic rules of our electoral system. Furthermore, it is being asked to oversee and supervise our electoral process. A similar situation arose during the 1980 elections when the United States District Court for the District of Puerto Rico acted on matters of Puerto Rican electoral laws. (Emphasis added).

On November 20, 2004 at eleven forty in the morning (11:40 a.m.) the President of the State Elections Commission submitted a brief before us titled "Appearance in Compliance with Order". He states the following in his brief:

...

2. On the material aspects, we adopt by reference the procedural and factual background stated by the appellants. The appellants are voters who voted during the November 2, 2004 general elections. They claim to

have voted under the PIP emblem and for the candidates Aníbal Acevedo-Vilá and Roberto Prats. The SEC acknowledges that vote as a split vote, a voting category recognized in our system. [7] This was so stated by the SEC in a Resolution (Appendix, page 38). After the general elections, absent a consensus among the Electoral Commissioners, the SEC proceeded to conduct a general vote canvass; [8] at this time, it is being conducted as required by law.

3. Meanwhile, an action was filed in the United States District Court for the District of Puerto Rico, Civil No. 04-2251 (DRD) (Appeal Appendix, page 11). We include herein a copy of the brief we submitted in that case (Appendix, page 1). We adopt by reference the statements contained therein. Yesterday afternoon, the United States District Court for the District of Puerto Rico issued an Order, which we attach (Appendix, page 60.)

4. With this background, this High Court must evaluate the parties' appearances and proceed as required by law. The right to vote is fundamental. The SEC acknowledges this. There is a statute and there are regulations to ensure uniformity in the adjudication of ballots. A handbook was prepared and distributed to help electoral functionaries (from political parties, who work at the polling centers, voting and canvassing tables). This meets the applicable statutory and constitutional requirements. Voters who did vote and exercised their right by casting a split vote should not be deprived of protection. (Emphasis added.)

On November 20, 2004 at eleven forty-three in the morning (11:43 a.m.) the Popular Democratic Party Electoral Commissioner filed a motion before us titled "Motion to Supplement Appearance by the Popular Democratic Party Electoral Commissioner". The party stated in his motion:

> Plaintiff voters cast a vote following the regulations and ads posted by the SEC in the press (see Attachment 2, page 2, "How to cast a split vote"). The court of instance

dismissed the case on the premise that the plaintiff voters had suffered no damages because the SEC had already decided to adjudicate their votes. **The court, however, did not seem to consider the federal action filed by various NPP voters questioning the plaintiff voters' right to express their electoral intent with the marks made by them on their ballots.** A reading of the allegations in the complaint and the documents submitted in this case make it evident that the core of the controversy is the adjudication of the split-ticket votes containing three marks. **It is the intention of the federal plaintiffs that the federal court declares those votes null, which would be the equivalent of an impeachment in court of the votes cast by plaintiff voters in this case. Such an impeachment –although in federal court- requires that those voters be allowed to defend their vote.** See PPD v Barreto, 111 D.P.R. 199 (1981), Granados-Navedo v. Rodríguez-Estrada, 127 DPR 1 (1990). [9] **Plaintiffs do not have that opportunity in the federal forum, where they have been denied standing as intervenors in the proceedings. Therefore, if this court does not revoke the decision by the lower court and issues a writ of certification, plaintiffs and all the thousands of voters who cast their vote in this way will have been denied *de facto* the rights guaranteed by the Electoral Act.** This Court has already acknowledged in Salas-Soler v. Secretary of Agriculture, 102 D.P.R. 716 (1974) that when a statute expressly authorizes a citizen to go before the courts to defend some fundamental principle contained in that statute, the doctrine points towards openness and the liberalization of access to the courts. Under this doctrine, the court of instance erred when it closed its doors to plaintiffs, whose votes are in evident danger of being annulled by a federal court.

Yesterday afternoon, the District Court ordered that **all** ballot satchels be opened and that the split votes at issue be segregated, supposedly so the court may evaluate whether

or not said court should assume jurisdiction. See Attachment 1. No doubt, the federal court is getting ready to make a decision as to the validity of the votes at issue pursuant to **our Electoral Act**, should the number of ballots be substantial. We must highlight that, in keeping with the Order in question, the federal court will act in the matter **only** if its ruling will decide the electoral results. In other words, the District Court has ignored the First Circuit Court's mandate to the effect that:

> [A] federal court may not inject itself into the midst of every local electoral dispute. Election law, **as it pertains to state and local elections, is for the most part a preserve that lies with the exclusive competence of the state courts.** . . Thus, with only a few narrow and well-defined exceptions, federal courts are not authorized to meddle in local elections. Consequently, they normally may not superintend the step-by-step conduct of local electoral contests or undertake the regulation of "garden-variety election irregularities."
>
> Bonas v. Town of North Smithfield, 265 F. 3d 69, 74 (1st Cir. 2001) (citing from Griffin v. Burns, 570 F.2d 1065, 1076 (1st Cir. 1978) (Emphasis added.)

Evidently the order by the federal court has the effect of stopping the general canvassing of vote tallying sheets and, on its face, creates a severe risk of irregularities since it orders that **all** satchels be opened (which number over 7,000) within a term of 48 hours (Saturday and Sunday), failing to have conducted a complete inventory, and then **extracting** an indeterminate number of ballots.

In addition to creating the difficulties mentioned above, and not having the matter before the District Court for consideration, it expressly ordered the indefinite stay of any final certification of a winner in the gubernatorial race.

We respectfully understand that only a timely decision by this Honorable Court regarding the validity of the

votes at issue may stop the serious disruptions mentioned above. (Emphasis added.)

On November 20, 2004 at eleven forty-eight in the morning (11:48 a.m.) the New Progressive Party Electoral Commissioner filed a "Notice of Removal" to the United States District Court for the District of Puerto Rico in the instant case, pursuant to section 1446(d) of Title 28 U.S.C.A. I enclose the notice with the documents filed with the primary federal forum titled "Notice of Removal".

On November 20, 2004 at twelve thirty-three in the afternoon (12:33 p.m.) co-plaintiff and appellant herein, Marta Font, came before us through a motion titled "Motion by Intervenor in Compliance with Order". She adopted the arguments by co-plaintiff Manuel ("Manny") Suárez-Jiménez and co-defendant in the case at bar and appellee herein, the Popular Democratic Party Electoral Commissioner. She stated the following in her motion:

. . .

4. Offhand, we highlight the fact that in the federal case **Rosselló et al v. Sila Calderón**, et al, Civil 2004-2251 (DRD), there is not a single party who is a voter that voted as plaintiffs did in this case. **The party appearing herein informs the Curia that at least as to her case, she refuses to appear before that forum because, as an independence advocate, she does not recognize that court's jurisdiction in Puerto Rico. In fact, we ask that the Court take judicial notice of the fact that the Puerto Rican Independence Party and its followers, including plaintiffs and the party appearing herein, have continuously stated that they do not recognize the federal court's jurisdiction in Puerto Rico.**

5. The logical consequence of this situation is that this is the only forum where these voters may come to seek protection of the vote they cast this past November 2.

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6. On the premise that the SEC President, Hon. Aurelio Gracia, estimates the split votes such as the ones here at issue to be at 28,000, should this Honorable Court fail to assume jurisdiction the result would be that these voters would have no forum to seek redress in light of the collateral attack launched at this time by the New Progressive Party in federal court against these voters.

...

8. The party appearing herein understands that the controversy before the Court is strictly of a legal nature and cannot be resolved by this Curia without having to remand the case to the lower court. The Complaint includes a copy of the split vote at issue as an exhibit, and a copy of the amended complaint being heard in the United States District Court for the District of Puerto Rico, which creates the case and controversy required to issue the declaratory judgment requested of the lower court. E.L.A. v. Aguayo, 80 D.P.R. 552 (1958). Likewise, the defendants-appellees have been given an opportunity to be heard. Therefore, there is no legal or constitutional impediment for this Curia to resolve the controversy raised as to whether or not the split votes here at issue are valid votes.

9. Finally, the party appearing herein echoes the position outlined by plaintiffs in their Petition for Writ of Certification, to the effect that her intention when voting under the PIP emblem was to preserve that party's electoral franchise, while voting in favor of Aníbal Acevedo-Vilá for governor and Roberto Prats for Resident Commissioner.

FOR ALL OF WHICH, we very respectfully pray that this Honorable Court issues the writ requested and rules that the votes at issue are valid. **We further pray that the SEC be ordered to complete the canvassing and, if need be, the vote recount by December 22, 2004.** We likewise

pray that once this process has been completed, the SEC issues a certification as to the winner of the gubernatorial race, as appropriate, such that the governor-elect may have been sworn into office by the time the legislative session begins. (Emphasis added.)

On November 20, 2004 at one forty-five in the afternoon (1:45 p.m.) attorney Efraín Cintrón-García filed a "Motion for Intervention" before us to have him included as a plaintiff in the case at bar and "be allowed to make his appearance representing himself in his own defense, and be afforded his right to present evidence in his favor, confront and cross-examine the defendant-appellee." He further asked that he be added to the allegations made by plaintiffs in the case at bar.

On November 20, 2004 at four sixteen in the afternoon (4:16 p.m.) plaintiff-appellee Marta Font filed another motion before us titled "Motion for Urgent Adjudication in the Case". She argued the following in her motion:

1. We received notice this afternoon that the New Progressive Party Electoral Commissioner, Thomas Rivera-Schatz, had filed a "Notice of Removal" to federal court for the case at bar. Although evidently a frivolous petition to the federal court, we hereby pray that this Curia rule on the instant controversy as quickly as possible, and deem the motion for removal as not having been filed, for the reasons we state below.

2. To begin, it is totally false that the complaint in the instant case involves federal rights under the United States constitution and/or federal laws, as alleged in the petition's ¶7, page 2. On the contrary, as **independence advocates**, plaintiffs and intervenor have deliberately invoked rights solely and exclusively under the Commonwealth Constitution and the Commonwealth Electoral Act, because none of the plaintiffs acknowledges the federal court's jurisdiction to resolve this issue.

3. Although we should not be surprised by the false jurisdictional allegations raised by the Commissioner and brother counsel Rivera-Schatz, we must inform this Curia that plaintiffs and intervenor made it very clear before the lower court, precisely, in the presence of the attorneys who signed the **Motion for Removal** in this case, that plaintiffs and the party appearing herein do not recognize the federal court's jurisdiction in Puerto Rico and that was the reason why they were not appearing before the federal court to vindicate their right to vote.

4. We stress the fact that Commissioner Rivera-Schatz recognizes how false his jurisdictional allegations are in his own motion for removal, since ¶8 of his motion, page 2, acknowledges that the allegations in the complaint are strictly of a state nature when he says "[I]n their Complaint, the Jiménez [10] protest a violation of their constitutional right to vote, a right they **attempt** to base entirely on the due process right and equal protection clauses of the Puerto Rico Constitution. The Jiménez artful pleading, however, cannot conceal the essentially federal nature of their claims." [Emphasis added.]

5. As we can see, in order to obtain jurisdiction over the matter, Commissioner Rivera-Schatz is forced to submit false allegations before the federal court so it may exercise a jurisdiction that does not exist, and in order to do that he re-writes the allegations in the complaint to claim that black is white and white is black.

6. Rivera-Schatz' allegations in the Notice of Removal he filed in federal court are equally disingenuous and intended to induce the federal court to err by conveniently omitting that the federal appellate courts, particularly the First Circuit in Boston, have ruled that electoral matters must be resolved first in state courts. See, for example, Bonas v. Town of North Smithfield, 265 F 3rd 69, 74 (1st Cir.), Griffin v. Burns, 570 F. 2d 1065, 1076 (1st Cir. 1978);

Granados Navedos v. Acevedo, 703 S. Supp. 170, 175 D.P.R. 1988); Bennet v. Yhoshina, 140 F 3rd 1218, 1226 (9th Cir. 1988) (citing other cases.) See also the federal cases cited in **PSP v. CEE**, 110 D.P.R. 400 (1980).

7. In light of the above, we understand that the federal court does not have jurisdiction over the matter to ask for the removal of the instant case to said forum, and that what Commissioner Rivera-Schatz is attempting to do with such a removal is to turn this into an moot issue, tying up the case in federal court until January 2, the date on which the governor-elect should be sworn into office. The federal court, then, is given an opportunity to annul the split votes at issue here or, in the alternative, postpone the resolution of the controversy such that the Legislative Assembly may invoke Art. IV, ¶9 of the Commonwealth Constitution, in effect allowing the legislature to be the one that selects the governor.

FOR ALL OF WHICH, we very respectfully pray that this Court finds there is no legal or jurisdictional reason to prevent this Honorable Curia from issuing the Writ of Certification, and to resolve the controversy at bar, since the federal court has no jurisdiction on the matter, this being a controversy strictly grounded on the Commonwealth of Puerto Rico Constitution and its laws.

Likewise, Electoral Commissioner Rivera-Schatz having filed his opposition to the Petition for Certification with his Motion for Removal to federal court, we pray that this Honorable Court's considers its obligation fulfilled as to having afforded said party an opportunity to be heard, and to move forward with the proceedings as provided by law.

ACTIONABLE CAUSE

As a preliminary step to any analysis of the certification appeal on its merits, based on Puerto Rico's laws, we must analyze the findings made by the Court of First Instance and this Court in light of the actionable cause principle vis-à-vis

the legal standing, moot issues, and judicial review doctrines. This matter is inherent to the exercise of the powers vested in the Judicial Branch, within the republican system of government encased within the Puerto Rico Constitution. The authority to evaluate and analyze features related to actionable causes is born out of the elementary principle of the court's existence being solely to resolve genuine **"cases and controversies"** arising between opposing parties having an actual interest in obtaining a remedy that will affect their legal relationships. [11] Courts impose on all of us the limitations stemming from these doctrines, among other things, to monitor and guarantee the fair balance required of the different branches of government in order to administrate public affairs. An analysis of this principle, therefore, is imperative within our system of separate government powers. The limitations arising from such a system impose a minimum number of conditions for the discreet and tolerable exercise of a power that, otherwise, would constitute a clear threat to the quality of the system's democracy. [12]

The courts' jurisdictions are determined by the application of the various doctrines that bring to life the principle of actionable cause, particularly as to the controversies brought before them pursuant to the rights guaranteed by our Constitution and the democracy thereby implemented. Therefore, this is a threshold matter to be analyzed in light of the issue now before us.

LEGAL STANDING

A party's competency to effectively conduct procedural actions as a litigant and to appear as a plaintiff or defendant, or representing either one, is known as having "legal standing in a case". Active legal standing is required in order to be a plaintiff, and passive legal standing is required in order to be a defendant. [13]

A person attempting to be a party must have an individualized and concrete competency as to his or her claim before the courts. The "competency to sue" must exist in

order for an "action with legal standing" to exist. Yet, not everyone with the "competency to sue" has "legal standing" in a specific litigation. The interested party must show in each case that he or she has a "legitimate interest" [14] in addition to the "competency to sue".

Legal standing is an instrument for self-containment and judicial prudence originating with the actionable cause principle of any controversy. [15]

The doctrine through which a claimant's legal standing is examined has been sustained in our court system as one of the necessary ingredients to establish the court's jurisdiction, taking into consideration of the actionable cause principles. A party who meets the following requirements has legal standing: (1) the claimant must have suffered a clear and palpable damage; (2) the damage must be real, immediate and precise, not abstract or hypothetical; (3) the action taken must have a reasonable causal relationship to the damage alleged; (4) the cause of action must be covered by the Constitution or some law. [16]

ADVISORY OPINION

We stated the following in Ortiz-Rivera v. F.E.I. [17]:

The concept of "*advisory opinion*", which has a constitutional origin, is defined as the legal opinion issued by a court when it **does not have an actionable case or controversy to consider**, and hence the result thereof has no binding effect, *Black's Law Dictionary*, p. 1119 (7th edition 1999). The advisory opinion doctrine is integral to the constitutional concept of "*actionable cause*" that governs in our jurisdiction, and which sets forth the requirement of a real case or controversy in order to legitimately exercise the judicial powers.

The advisory opinion doctrine is intended to prevent having decisions rendered in a vacuum, in the abstract, or under a speculative hypothesis, since it is not the court's

function to act as an advisor or counselor. ***Com. de la Mujer v. Srio de Justicia*****, 109 D.P.R. 715, 721 (1980);** **E.L.A. v. Aguayo, 80 D.P.R. 552, 558-560 (1968).** In short, courts are barred from issuing advisory opinions subject to review or interpretation by other branches of government. R. Serrano-Geyls, *Derecho Constitucional de Estados Unidos y Puerto Rico* [United States and Puerto Rico Constitutional Law], Vol. I, p. 116 (1986).

However, the *obiter dictum* concept is applicable when the court issues unnecessary statements **in a case or controversy before said court**, about legal questions that have not been properly raised. *Black's Law Dictionary*, op. cit., p. 1100. Since these statements are not directly related to the issues at hand, they set no legal precedent whatsoever. *Martínez v. Registrador*, 54 D.P.R. 7 (1938); *Ponce & Guayama Railroad Co. v. Antonetti*, 17 D.P.R. 352 (1911).

The "*advisory opinion*" constitutional doctrine is applicable, by its own definition, only when the matter as to which the court made a statement **failed** to meet the constitutional requirements of an "actionable cause", in other words, **it was not actually a "case" or "controversy"**. The courts must make sure that matters brought before them for their consideration are actionable causes. Otherwise, the actions must be dismissed with no further explanation. (Emphasis added.)

The allegations made by plaintiffs in the Court of First Instance and by appellants here clearly reveal they have suffered no immediate, clear, palpable, real, precise, and concrete damage, thus they have no actionable cause to file an action for a declaratory judgment before the Court of First Instance. The damage cannot be abstract, hypothetical, or speculative. The State Elections Commission made a decision that was favorable to appellants herein, to the effect of having their votes counted as split votes, ascribing value and significance to all markings made by them on the ballot, as appellants have admitted in their briefs before this Court.

The decision made by the State Elections Commission as the body with authority, competency and jurisdiction over the matter is endowed with the presumption of legality and correctness, and is favorable to appellants herein. Thus, they **do not have a "case and controversy"** to submit before the Court of First Instance seeking a declaratory judgment, since they have not been affected by the decision the State Elections Commission made, nor is there a legal situation to define through this procedural recourse as to the scope and value of the votes they cast this past November 2, 2004, given that the agency in question attributed to such votes the significance sought herein by the appellants. The Court of First Instance and this Court do not have an actionable cause before them, because no "**case and controversy**" has been submitted by the plaintiffs and appellants at bar.

Appellants allege before us that a decision by the United States District Court for the District of Puerto Rico on an action now pending that questions the constitutional validity of the rules on split votes and their application on the value and significance of certain split votes **could** affect the validity of their vote. Therefore, they understand and effectively allege that the Puerto Rico Court of First Instance and this Court, where the presumption of legality and correctness of the State Elections Commission's decision has not been challenged by the parties adversely affected, have jurisdiction to resolve a matter that has never been raised by the parties adversely affected as a result of the proceedings held before the State Elections Commission and its President. We conclude that if appellants herein believe the federal court **could** affect the presumption of legality and correctness that protects the State Elections Commission's decision, which favors them as to the value and significance of their votes, the only recourse they have is to intervene in the action pending before that court. The fact that any one of the parties holds an ideological position or criteria that does not acknowledge the authority and jurisdiction of the federal

courts on some matter or controversy between United States citizens residing in Puerto Rico, and its government, does not constitute valid legal grounds to try to deprive the federal judicial forum from assuming jurisdiction, and to have this court assume jurisdiction on a matter initially raised before said federal court.

The Popular Democratic Party Electoral Commissioner comes before this court, as he effectively and expressly states in his motion for intervention, because the United States District Court for the District of Puerto Rico **could** assume jurisdiction on the basis of the testimony from a witness presented by plaintiff therein during the evidentiary hearing, and **could** interpret Puerto Rico's Electoral Act and its Regulations. Notwithstanding, he overlooks and bypasses the Puerto Rican constitutional law principles as to legal standing and judicial review regarding actionable causes in matters submitted to the Puerto Rico courts. These principles, contained in the Puerto Rico Constitution, regulate the intervention by and jurisdiction of the Puerto Rico General Court of Law, including this Court.

The undersigned has no doubt, upon examining the briefs submitted by some of the plaintiffs in the case at bar and appellants herein, and those submitted by some of the defendants in the case at bar and appellees herein, that there is a collusion among them to try to affect the federal court's jurisdiction over the matter submitted there and to try to bring it to this Court's attention, as fist instance and original jurisdiction, defying the constitution and laws of Puerto Rico and the United States. By adopting this position and taking a course of action, the Majority becomes a participant in the fabrication of a monstrous creature that constitutes an act of civil disobedience.

This court, in spite of its name (Supreme Court), does not have the authority to endow its own powers with dimensions that the Puerto Rico Constitution has not granted. Nor can it encroach on the federal court's jurisdiction, as provided for

by the federal legal system. The Court of First Instance and this Court may only issue binding decisions for those parties who come before us when there is a "**case and controversy**" involved and there is jurisdiction to do so. We conclude that the matter before us is not actionable under Puerto Rico law, because the plaintiffs at bar, appellants herein, have no legal standing to bring forth an action and have failed to present a "**case and controversy**" before the Court of First Instance and this Court. This Court lacks jurisdiction to take any action under the federal laws and Puerto Rico's constitutional law. We further conclude that appellants are attempting to get an **advisory opinion** from this court that favors them, to which the Majority has agreed in complete and utter disregard for the constitutional principles of both Puerto Rico and the United States as mentioned above. The highly irregular and hurried actions by the Majority in this matter deprive this Court of legitimacy, since their decision is not binding as per our constitution and laws, and as per federal statutes, in addition to undermining their reliability and credibility before the eyes of the citizens.

For all of the above, I vehemently and from the greatest depths of my mind and spirit **DISSENT** from the actions taken by the Majority in this matter.

Efraín E. Rivera-Pérez
Associate Justice

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[1] Sweeney v. Resolution Trust Corporation, 16 F. 3d 1 C.A.1. Mass, (1994); Hernández-López v. Commonwealth of P.R., 30 F. Supp. 2d 205, the latter resolved by the United States District Court for the District of Puerto Rico.

[2] Hyde Park Partners, L.P. v. Connolly, 839 F. 2d 837 C.A.1. Mass. (1988).

[3] Rule 5(b) provides as follows in its pertinent portions:

Justices may only reserve the right to issue an opinion after a Court decision has been certified when, given the nature of the matter involved, the majority of the Court has decided to

shorten the terms established herein. **Under these circumstances, the Justice who has reserved this right must circulate his or her opinion within a term of ten (10) days as of the date on which such reservation has been notified.** The other Justices shall have an additional term of five (5) days to state their positions as to the opinion described earlier. These terms having simultaneously concluded, all opinions or statement will be certified and as of that point in time no other opinion or statement on the case shall be certified.

[4] On that date, Friday, November 18, 2004, the electronic research system we Associate Justices have available in our offices was not working.

[5] We dissent from such a course of action; the undersigned would have granted the New Progressive Party Commissioner until Monday, November 22, 2004 at five in the afternoon (5:00 p.m.) The motion for extension by the State Elections Commission President was handed to us after the Majority Decision was certified, granting both until Saturday, November 20, 2004 at twelve noon (12:00 p.m.) We were not able to evaluate it sooner such as to be able to offer our criteria on the matter. We learned about the certification of the Decision and the existence of said motion by the State Elections Commission's President through the media, when a press conference offered by one of the members of this Court was broadcast.

[6] A copy of said documents was given to us on November 20, 2004 at nine fifty-three in the morning (9:43 a.m.). The haste, urgency and celerity with which this process was submitted to the Majority was not applied to the delivery of this document to the undersigned Justice on November 20, 2004 who was at his office until the evening hours and subsequently available at his place of residence to take care of any related matter in light of the urgency conveyed.

[7] To that effect, see Article 1.033(33) of the Electoral Act; Rules 50, 78 and 81 of the "Regulations for 2004 General Elections and the General Vote Canvass", and

Sections 58 and 59.2 of the "2004 General Elections Procedures Handbook". Plaintiffs in the case pending before the United States District Court for the District of Puerto Rico seem to have adopted the theory that the appellants' vote in the case at bar is null, because it is not illustrated in any of the examples shown on said handbook. The examples are only that, "examples". They do not operate as "numerus clasus", much less when it comes to suffrage. For this to be the case, it should have been so stated at least in the handbook and regulations, not to mention the law itself.

[8] In the federal litigation, plaintiffs allege that the SEC fell into error when it failed to conduct the general canvass simultaneously with a recount as provided for under rule 118 (8) of the General Elections Regulations. They have stated that the SEC should have acted on the basis of P.P.D. v. Barreto-Pérez, 110 D.P.R. 376 (1980). **However, to our knowledge, the New Progressive Party Electoral Commissioner did not appeal to the Court of First Instance, as provided for in Article 1.016 of the Electoral Act.** On the other hand, those plaintiffs overlook the fact that in P.P.D. v. Barreto-Pérez there was consensus among the electoral commissioners, and the fact that the electoral regulations cannot prevail over the statute when in conflict and absent a consensus among the electoral commissioners. Cf. López-Feliciano v. Melecio, KPE 00-2255 (904), affirmed in KLCE 2000-1076. Article 6.011 of the Electoral Act is clear when it requires a general canvass as a previous step to a recount. (Emphasis added.)

[9] Although these cases deal with the impeachment of an illegal vote, that is, when the voter is alleged not to have had the right to vote, it is evident that when a voter does have a right to vote, his or her right must be guaranteed even more zealously, and therefore, he or she must have some way of defending that vote in court.

[10] We question that the Martínez Odell & Calabria law firm was the one drafting this Notice of Removal, since it makes the mistake normally made by North Americans when

they confuse the mother's surname with the father's surname. Note that the notice uses the surname *Jiménez* instead of *Suárez* or *Suárez-Jiménez*.

[11] E.L.A. v. Aguayo, 80 D.P.R. 552, 558-559 (1958).

[12] Id., on page 597.

[13] L. Ribó-Durán, Diccionario de Derecho [Law Dictionary], Barcelona, Ed. Bosch, 1987, page 364.

[14] E. Serrano-Geyls, op. cit., page 132: Col. Ópticos v. Vani Visual Center, supra.

[15] Id., E.L.A. v. Aguayo, supra.

[16] García-Oyola v. J.C.A., 142 D.P.R. 532 (1997); P.P.D. v. Rosselló-González, 139 D.P.R. 643 (1995).

[17] Ortíz v. Panel F.E.I., 155 D.P.R. _____ (2001), 137 J.T.S., des. of October 8, 2001, 2001 T.S.P.R. 134.

IN THE SUPREME COURT OF PUERTO RICO

Manuel R. ("Manny") Suárez-Jiménez, et al.
Appellants
v.
State Elections Commission, et al.
Appellees

Certification
2004 TSPR 185
163 DPR

Case Number: CT-2004-4
Date: November 30, 2004
(Dissenting Opinion by Associate Justice Rebollo-López)
Court of First Instance
San Juan Superior Court
Attorney for Appellant:
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In Re: Petition for Writ of Certification on appeal before the Court of First Instance in San Juan.

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IN THE SUPREME COURT OF PUERTO RICO

Manuel R. ("Manny")
Suárez-Jiménez, et als.
Appellants
v.
State Elections
Commission, et als.
Appellees

CT-2004 -004
CERTIFICATION

DISSENTING OPINION BY ASSOCIATE JUSTICE REBOLLO-LÓPEZ

San Juan, Puerto Rico, on November 30, 2004.

This Court is undoubtedly the ultimate interpreter of the Commonwealth of Puerto Rico Constitution and Laws. This does not mean, however, that we have the power and authority to act arbitrarily and inopportunely. The reason is surprisingly simple: that very same Constitution — which, we repeat, designates us as the ultimate interpreter of its provisions — prohibits that.

We dissent from the Opinion rendered by a majority of the members of this Court for two reasons. First, the appeal submitted for our consideration does not pose a "case or controversy" over which this Court must make a finding. In doing so, what the Majority rendered was an "advisory opinion" — barred by our Constitution.

Second, we dissent inasmuch as the Court in this case — once a petition for removal ("notice of removal") had been filed in the United States District Court for the District of Puerto Rico regarding the case at bar, and having been notified thereof — could proceed no further until such time as the U.S. District Court ruled on the appropriateness of said motion for removal; this, in light of the clear provisions to that effect contained in 28 U.S.C.A. sec. 1446(d).

Based on the above, we postponed the certification of this dissenting Opinion, reserving the right to publish it subsequently, as provided for by Rule 5 of our Rules. Today, forced by the provisions of the aforementioned Rule —

which grants us only ten days to publish the opinion, counted as of the date on which the privilege is reserved — we proceed to certify this Dissenting Opinion. Let us begin.

[1] This section provides as follows:

"Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded." (Emphasis added.)

I

General Elections were held in Puerto Rico on November 2, 2004. After an initial vote count, the State Elections Commission — pursuant to the provisions of Article 6.007 of the Puerto Rico Electoral Act, Public Law No. 4 of December 20, 1977, as amended, 16 L.P.R.A. sec. 3267 — reported that, according to the preliminary results, the gubernatorial candidate with the highest number of votes up to that point in time was Aníbal Acevedo-Vilá.

On November 9, 2004 the general canvassing of all ballots began, pursuant to the provisions of Article 6.008 of the Electoral Act, 16 L.P.R.A. sec. 3268. During this process, the New Progressive Party — through Mr. Thomas Rivera-Schatz, Electoral Commissioner for the Party in question — objected to the validity of certain state ballots on which voters made three marks, one under the Puerto Rican Independence Party emblem, another one in the box provided for the Popular Democratic Party's gubernatorial candidate, and another one in the box provided for the Popular Democratic Party's candidate for Resident Commissioner. The specific argument raised was that these ballots were null as there was no way to ascertain the voter's true intent.

Through a resolution to that effect, on November 12, 2004 Mr. Aurelio Gracia-Morales, State Elections Commission

President, ruled that the ballots in controversy were valid and would be adjudicated as split votes. Gracia-Morales cited Part 33 of Article 1.003 of the Electoral Act, 16 L.P.R.A. sec. 3003[2], and Rule 78 of the 2004 General Elections and General Vote Canvassing Regulations[3] approved on July 2, 2004, as grounds for his decision.

[2] The part in question provides:

Split-Ticket. - Shall mean that in which the voter casts a vote by marking the electoral ballot individually or in combination with a mark under a party's emblem, for any combination of candidates, whether or not from the same party or independent candidates, or by adding a name to the ballot that is not included in a box.

[3] Paragraph 2 of this Rule provides:

Split-Ticket – That in which the voter casts a vote by marking the electoral ballot individually or in combination with a mark favoring a party's emblem, for any combination of candidates, whether or not from the same political party or independent candidates, or by adding a name to the ballot that is not included in a box.

On the other hand, on November 8, 2004, the State Elections Commission President issued another resolution in which he reiterated his decision to the effect that it was appropriate to conduct the general canvassing of votes prior to a vote recount, as provided for by Article 6.011 of the Electoral Act, 16 L.P.R.A. sec. 3271. None of these resolutions were appealed within the time period provided by law, thus becoming firm and final after the ten days following notice thereof.

Within this scenario, on November 16, 2004 the appellants herein filed a complaint before the Court of First Instance, San Juan Superior Court, petitioning for a declaratory judgment, alleging that on November 12, 2004, through an action filed before the United States District Court for the

District of Puerto Rico, co-defendants Pedro Rosselló-González and Thomas Rivera-Schatz had petitioned, among other things, for the state ballots reflecting the aforementioned three marks to be declared null.[4] They argued that such an action by co-defendants "was an attempt to get the SEC to annul the plaintiffs' votes, and those of all others who voted in like fashion."[5] They also argued that "such deprivation would cause irreparable damage to plaintiffs since their votes would not be counted, which would be the equivalent of preventing them from exercising their constitutional right to vote."

[4] This complaint further asked for the federal court to order the State Elections Commission to proceed with the vote recount simultaneously with the general canvass, as provided for in Article 6.011 of the Electoral Act.

In light of the above, appellants — even when they had admitted that those votes had been declared valid by the State Elections Commission and were being counted and adjudicated as split votes — asked the lower court for a judgment declaring the validity of such ballots. They likewise asked the lower court to issue a permanent injunction ordering the State Elections Commission to count those votes.

The Court of First Instance dismissed the complaint when it concluded that the cause was not actionable.[6] The court cited the fact that the State Elections Commission President had rendered his decision on November 12, 2004 finding that the ballots at issue had to be adjudicated and counted as "split-ticket votes"; that is to say, the Court of First Instance found that the plaintiff's action was moot, since the Commission had already made a decision that was favorable to defendants [sic].

[5] See page 3 of the Complaint filed before the Court of First Instance, San Juan Superior Court, in the case of Manuel R.

("Manny") Suárez-Jiménez, et al. v. State Elections Commission, et al., No. KPE 04-3568.

[6] The Court of First Instance gave its ruling in open court and put it in writing on November 18, 2004.

Unsatisfied with said decision, plaintiffs came before this Court seeking a Writ of Certification, alleging that the Court of First Instance erred when it:

... dismissed the case of caption on the grounds that the cause was not actionable; ... failed to grant temporary remedies that would guarantee the votes of those voters who voted during the November 2, 2004 elections.

On November 19, 2004 the Court granted the appellees until noon on November 20, 2004 to state their position. At that time the undersigned Justice stated he "would deny the Petition for Certification because he understood there was no case or controversy, reason for which any statements made by the Honorable Supreme Court would be merely an advisory opinion."

On November 20, 2004 a majority of the members of this Court, citing the alleged importance of certifying the instant case and not "abdicating our constitutional obligation" decided to assume jurisdiction and reversed the Judgment of the Court of First Instance. By taking such an action, the Majority completely overlooked the fact that there was no actionable cause in this case, since the matter had already been given a firm and final resolution by the State Elections Commission President in his decision of November 12, 2004.

The Majority — failing to provide any reasonable explanation — ignored the factual reality that, by virtue of the State Elections Commission's decision, the votes that appellants were attempting to "protect" were not only counted as valid votes, but were further adjudicated as "split votes" in favor of the Puerto Rican Independence Party and the Popular Democratic Party candidates.

At that time we stated in the Opinion and Judgment that the undersigned Justice, "although having a dissenting Opinion prepared and ready to be certified, did not intervene and publish his position at this stage of the proceedings given that a motion for removal ("Notice of Removal") had been filed in the case at bar before the United States District Court for the District of Puerto Rico by one of the parties; such motion for removal orders the automatic stay of proceedings at the local or state level and deprives the local court of jurisdiction, by express mandate of a federal statute applicable to Puerto Rico, to wit: 28 U.S.C.A. 1446(d). The actions by the Majority are useless, inofficious, and non-binding. Associate Justice Rebollo-López reserves the right to publish his Opinion once the motion for removal has been ruled upon."

II

This Court has repeatedly stated that the courts of law are here to resolve genuine controversies between opposing parties having an actual interest in obtaining a remedy that will affect their legal relationship. El Vocero v. Junta del Planificación, 121 D.P.R. 115, 123 (1988), Comisión de Asuntos de la Mujer v. Secretario de Justicia, 109 D.P.R. 15 (1980); E.L.A. v. Aguayo, 80 D.P.R. 552 (1958). We have ruled that a matter is not actionable: (i) when it is intended to resolve a political issue; (ii) in those cases in which one of the parties has no [active legal standing] to file the action; (iii) when facts subsequent to the filing of the case make the issue moot; (iv) any time the parties are seeking an "advisory opinion"; or when litigation is initiated on a matter that has not yet fully matured. See: Sánchez v. Secretario de Justicia, des. of June 28, 2002, 2002 T.S.P.R. 98; Noriega v. Hernández-Colón, 135 D.P.R. 406, 422-21 (1994).

To that effect, in Comisión v. Secretario, supra, we stated:

The concept of actionable cause originates in U.S. case law as derived from Art. III of their Constitution. It requires a real case and controversy for the valid exercise of the federal judicial power. It is the term of art used to express a dual

limitation imposed on the courts, to wit: (1) that they may decide only 'questions presented in an adversarial context and in a form historically viewed as capable of resolution through the judicial process' and (2) the restriction that stems from the role assigned to the judiciary in a tripartite allocation of powers, designed to ensure that it will not interfere in areas subject to the criteria of other branches of government. Flast v. Cohen, 392 U.S. 83 (1968). The doctrine is self-imposed. By virtue thereof, the courts themselves question and evaluate whether or not it is appropriate to hear a given case taking into account several factors and circumstances through an analysis that allows them to exercise their discretion as to the limitations of their constitutional powers. *Ibid.*, on page 720. (Emphasis added.)

These self-limiting doctrines are based on considerations derived from prudence and the constitutional limitations that bar the federal court from rendering advisory opinions. See: Rexach v. Ramírez-Vélez, des. of June 15, 2004, 2004 T.S.P.R. 97. We have been emphatic when we have stated that the court's function is not — nor can it be — to act as an advisor or counsellor, therefore advisory opinions by the courts are barred in our jurisdiction. See: Comisión de la Mujer v. Secretario, supra, on page 721; E.L.A. v. Aguayo, on pp. 558-560.

One of the factors to take into account in order to ascertain whether a case is actionable, is whether or not it has become moot issue. The concept of moot issue encompasses a situation in which, even when all other requirements for a cause to be actionable have been met, factual or legal changes taking place during the judicial process of a controversy make a solution thereto moot or academic. The foundations for such a doctrine are: (i) to avoid the unnecessary use of judicial resources; (ii) to ensure the existence of sufficiently adversarial positions over a controversy such that both parties may be able to present them competently and vigorously; and (iii) to avoid setting an

unnecessary precedent. *Ibid.* See, also, San Antonio Maritime v. Puerto Rican Cement, des. of February 16, 2001, 2001 T.S.P.R. 16; Empresas Puertorriqueñas v. H.I.E.T.E.L., 150 D.P.R. 924, 936 (2000); Misión Industrial de Puerto Rico v. Junta de Planificación, 146 D.P.R. 64, 81 (1998); P.P.D. v. Gobernador I, 139 D.P.R. 643, 675-78 (1995); Noriega-Rodríguez v. Jarabo, 136 D.P.R. 497, 507-08 (1994); Noriega v. Hernández-Colón, 135 D.P.R. 406, 437-439 (1994); C.E.E. v. Depto. de Estado, 134 D.P.R. 927, 935-36 (1993); Asoc. de Periodistas v. González, 127 D.P.R. 704, 7171 et seq., (1991).

Naturally, there are a number of exceptions to the application of the moot issue doctrine. These are: (i) when a recurrent or repetitive aspect of the issue keeps coming up; (ii) in those cases in which the plaintiff [sic] itself voluntarily puts an ends to his or her unlawful conduct; and (iii) when the factual situation has been voluntarily changed by the defendant, but does not appear to be permanent. There is also an exception for cases in which the court certifies a "class" pursuant to Rule 20 of the 1979 Rules of Civil Procedure, 32 L.P.R.A. Sec. III, and the controversy becomes academic for a member of the class but not for him or her to be a representative of said class; and in cases that appear to be academic but actually are not because of their collateral consequences. *Ibid.*

Consistent with the above, we have been emphatic when stating that if a showing is made to the effect that there is no genuine controversy, after the appropriate investigation — none of the exceptions listed above being present — the courts have a duty to dismiss the action filed without considering the issues on the merits. See: El Vocero v. Junta, supra, on pp. 124-125; E.L.A. v. Aguayo, supra, on page 562.

III

Appellants, in their complaint, petitioned the Court to issue a declaratory judgment to the effect that "the plaintiffs' votes are valid split votes, which are to be adjudicated in favor of

the PIP emblem and the PDP gubernatorial and Resident Commissioner candidates." Appellants do so notwithstanding the fact that they admit in their own complaint that the State Elections Commission had already resolved the controversy in their favor, ordering that the challenged state ballots be counted as valid and adjudicated as split votes. They likewise admit that the State Elections Commission decision became firm and final when no appeal thereof was filed within the time limits provided by law to that effect.

As we can see, the State Elections Commission's firm and final ruling coincides perfectly well with the appellants' contentions, even as to the manner in which those votes were to be adjudicated. This is why we can identify no reason whatsoever for this Court to issue the Writ that would grant appellants a remedy that had already been granted as part of an adjudicated controversy. It is evident that under these circumstances the actions by the Majority could have no practical ulterior effect. This is precisely what the moot issue doctrine addresses, to wit: avoiding the unnecessary use of judicial resources, assuring the existence of an adversarial contention on the issues, and avoiding unnecessary precedents.

We have already pointed out that the State Elections Commission's decision became firm and final, and that the ballots at issue here were being counted exactly as appellants demanded. As we can see, by issuing an Opinion, the Court's Majority, allegedly in response to "the importance of the matter and public interest to have the Court intervene directly in the adjudication of a matter of law", arrogated to itself a power it did not have, assuming jurisdiction in a case where there was no real controversy at all. By doing so, the Majority not only rendered an advisory opinion regarding the validity of the ballots at issue, but also insisted on discussing the matter of the vote recount, henceforth granting remedies for which it had no jurisdiction.

[7] That is to say, said votes were to be adjudicated in favor of the Puerto Rican Independence Party as well as the Popular Democratic Party candidates.

When there is no active or real controversy, this Court has a duty to dismiss the appeal without considering the issues on the merits. To act otherwise — as the Majority did — is a patent act of judicial imprudence and, quite evidently, amounts to rendering an advisory opinion. The fact that the issues raised are vested with great public interest that include a constitutional question — and just that — is not enough to give this Court jurisdiction if there is no real controversy to resolve.

The desire to state a position on a novel matter in order to protect the "suffrage" can in no way be sufficient to open up the doors to this Court so it may render opinions in matters that are no more than legal consultations. The controversy allegedly "resolved" by this Court by rendering an opinion had already been heard and resolved by the State Elections Commission and became firm and final long before this Court insisted on assuming jurisdiction in the matter.

[8] We must not overlook the fact that issuing a declaratory judgment requires "a substantial controversy between parties having adverse legal interests."

Finally, we believe it is important to highlight the fact that, with their actions, the Majority undermined the authority vested on local institutions — particularly the State Elections Commission — when they failed to acknowledge the firm and final nature of the Commission's ruling. In the face of these actions by the Majority, we must ask whether it helped in any way to counteract the alleged state of uncertainty the Majority mentions so often or whether, quite to the contrary, if had the effect of increasing it. There is no doubt that the best and most correct course of action in this case would have been to acknowledge and reaffirm the power of the Commission's President to resolve this type of issue and

ascribe full validity to the firm and final decision he had rendered.

IV

We cannot conclude without discussing, though briefly, the inappropriate and surprising action by the Majority when it certified the Majority's Opinion notwithstanding a formal notice received as to the filing of a motion for removal before the United States District Court for the District of Puerto Rico.

Federal case law on 28 U.S.C.A. sec. 1446(d) clearly establishes that once a motion for removal is filed in the U.S. District Court, all adverse parties have been notified of said filing and a copy of the motion has been filed with the state court, the latter may proceed no further[9]; the fact that all defendants were not a party to the motion does not invalidate it[10], since that is not a requirement or jurisdictional defect; the decision as to the motion's validity or lack thereof is the exclusive province of the federal court[11]; and, finally, any action or judgment by the state court subsequent to the motion for removal is null[12] *ab initio*.

[9] In re Diet Drugs, 282 F. 3d 220 (3rd Cir. 2002); Yarnevic v. Brink's, Inc., 102 F. ed 753 (4th Cir. 1996), Sweeney v. Resolution Trust Corporation, 16 F. 3d 1 (1st Cir. 1994); Hyde Park Partners, L.P. v. Connolly, 839 F. 2d 837 (1st Cir. 1988); Murray v. Ford Motor Co., 770 F. 2d 461 (5th Cir. 1985). Wright & Miller, Federal Practice & Procedure § 3737 (#rd Ed. 1998).

[10] In re Bethesda Memorial Hospital, Inc., 123 F. 3d 1407 (11th Cir. 1997); Balazik v. County of Dauphin, 44 F. 3d 209 (3rd Cir. 1995); Matter of Amoco Petroleum Activities Co., 964 F. 2d 706 (7th Cir. 1992); Johnson v. Hemerich & Payn,

Inc., 892 F. 2d 422 (5th Cir. 1990); Johnson v. Odeco Oil & Gas Co., 864 F. 2d 40 (5th Cir. 1989). Wright & Miller, supra, § 3721.

We are the first to admit that having a federal statute, under the particular circumstances of the instant case, that deprives us of our constitutional responsibility to interpret our laws and our Constitution, and of our primary duty to safeguard the rights of those who come before us protected by the Constitution, is not "agreeable".

Our personal desires and beliefs, however, are not enough to grant jurisdiction to this Court when it does not have it. We live in a federalist system of government, a system in which federal statutes prevail over local statutes; this happens not just in Puerto Rico but also in the fifty states of the Union.

V

In summary, the actions by the majority in the instant case have been surprising, erroneous, and regrettable. Unfortunately, they do affect this Court's credibility and prestige. That is why we fail to understand the reason for such a hasty and inappropriate action.

[11] National S.S. Co. v. Tugman, 106 U.S. 118 (1881).

[12] Resolution Trust Corp. v. Bayside Developers, C.A., 43 F. 3d 1230 (9th Cir. 1994); Ward v. Resolution Trust Corp., 972 F. 2d 196 (8th Cir. 1992); Hyde Park Partners, L.P. v. Connolly, supra; South Carolina v. Moore, 447 F. 2d 1067 (4th Cir. 1971).

FRANCISCO REBOLLO-LÓPEZ
Associate Justice

IN THE SUPREME COURT OF PUERTO RICO

Manuel R. ("Manny") Suárez-Jiménez; et al. Plaintiffs-Appellants v. State Elections Commission, et al. Defendants-Appellees	Certification 2004 TSPR 182 163 D.P.R.

Case Number: CT-2004-4

Date: November 23, 2004

(Supplementary Vote by Associate Justice Fuster-Berlingeri and dissenting opinion by Associate Justice Rivera-Pérez)

Court of First Instance

San Juan Superior Court

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v.

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Certification

CT-2004-4

Supplementary Vote of Associate Justice FUSTER-BERLINGERI.

San Juan, Puerto Rico, on November 23, 2004.

I

I take this opportunity, Associate Justice Rivera-Pérez having stated his position on the case at bar, to **expand** on what I pointed out on November 20, 2004, in a footnote to my concurring opinion as to the issue of the request for **removal** of this case to the federal forum, filed by the Electoral Commissioner of the New Progressive Party (NPP). This is done pursuant to the provisions of Rule 5(b) of the Puerto Rico Supreme Court Rules concerning cases in which a decision has already been rendered.

The point of departure for the serious consideration of this issue is the **incontestable** fact that the ultimate authority to interpret the country's electoral laws is the Puerto Rico Supreme Court. P.S.P. v. State Elections Commission II, 110 D.P.R. 538 (1980). This unquestionable authority of ours has been expressly acknowledged by the United States Supreme Court itself. Rodríguez v. Popular Democratic Party, 457 US 1 (1982). See, also, Bonet v. Texas Company, Inc., 308 US 463 (1940).

One of the consequences of the jurisdictional fact mentioned in the preceding paragraph is that whenever there is a case before the federal court that requires such court to consider any of the Commonwealth of Puerto Rico's laws or regulations, the federal court **has an obligation** to follow the interpretations of the Puerto Rico Supreme Court as to such law or regulation. **The federal court cannot make its own interpretation of such standards for Puerto Rico**; it must, instead, proceed exactly as the Puerto Rico Supreme Court would have proceeded had the latter had to consider the case. This federal principle of law has been well-defined by the United States Supreme Court on many occasions and it is one of the basic foundations of federalism. There was even a time when commentators used to say that regarding state law standards, the federal courts had an obligation to act as if they were just another state court; federal courts had the role of a **"ventriloquist's puppet."** All of this is well known by those who have fully studied federal jurisdiction matters.

What happens, then, if the federal court must consider an issue as to a Puerto Rico law that **has not been interpreted before by the Puerto Rico Supreme Court**? What must the federal court do in that situation? The most appropriate answer to this question is that if the Puerto Rico law deals with matters of high public interest, the federal court **must abstain from interpreting the law** and must then **refer it to the Puerto Rico Supreme Court so that the latter will be the one to interpret it**. This is what is known as **certifying** the matter to the Puerto Rico Supreme Court.

On the issue of the split votes that gave rise to the case at bar, it is public knowledge that at least one of the parties petitioned the federal court to certify said issue to the Puerto Rico Supreme Court, as it should have been. However, to the surprise of many, **the federal court refused to make the proper certification**. The feeble excuse given so as not to comply with its clear duty to certify the issue to the Puerto Rico Supreme Court was that the Supreme Court did not like

to have such cases certified!!! Such excuse is untenable. Note, first of all, that the Supreme Court's own Rules provide for the manner in which certifications from federal court are to be addressed. Rule 25 of our Supreme Court Rules establishes a special procedure for inter-jurisdictional certifications. Such a Rule would not exist if it were true that we are not interested in addressing such certifications. Moreover, the excuse goes entirely against that court's recent actions. Just a few months ago, the federal court certified to the Supreme Court certain questions about the laws of Puerto Rico in the case of Guzmán-Vargas v. Sila Calderón, CT-2003-2, and we accepted the certification. This has happened several times in the past. The above is the reason why the federal court should have complied with its duty and have certified for us the issue of the split votes, and if we did not accept it, then, and only then, could it say, and rightly so, that the Supreme Court was not interested in making an interpretation of the Puerto Rico Electoral Act.

The issue of the removal in the instant case should be examined in depth with this background in mind. Said case comes to us precisely because the federal court refused to comply with its duty to refer to us the issue of the split vote for our interpretation. **The federal court was the one who acted first in an astonishing attempt to preclude the Puerto Rico Supreme Court from performing its essential and exclusive duty to be the ultimate interpreter of the laws of Puerto Rico**.

As if the above were not grave enough as it is, when the instant case came to us, the NPP Electoral Commissioner then attempted to deprive us of our jurisdiction in that case by petitioning for a removal that **was clearly illegal and unwarranted**. Once more, there was an attempt to preclude this Court from engaging in its constitutional, essential and exclusive duty, this time with a crude motion for removal that failed to meet the most elementary requisites of federal law.

Said motion for removal contains the following fundamental defects. First, the motion for removal in question **was not signed by all of the defendants in the instant case**. Any first year law student knows that a motion for removal can be valid only if **all** of the defendants in a case so move. One of them alone cannot do so on its own. In this case, neither the State Elections Commission, nor the Popular Democratic Party and the Puerto Rican Independence Party Electoral Commissioners, who were also defendants in the case, moved for the removal. **The removal, then, was inappropriate**. Indeed, the United States Supreme Court itself upheld a decision by the Supreme Court of the State of Kansas in which a petition for removal was denied because not all of the defendants joined in on the request, just as in the instant case. Our position, then, is supported by the U.S. Supreme Court itself. See, Chicago R. I. v. Martin, 178 US 245 (1900); see, also, Gableman v. Peoria, 179 US 335 (1900).

Second, the petition for removal in question was fatally flawed because in the case at bar, the **plaintiffs**, who are the movants, filed solely under the laws of Puerto Rico. There was no federal question raised by them. Thus, there were no grounds whatsoever for federal jurisdiction. Even assuming that defendants had a **federal defense** to raise in light of plaintiffs' action, it is a fundamental well-known principle that **federal defenses cannot grant jurisdiction to a federal court in removal cases**. The United States Supreme Court has so ruled on multiple occasions, as has the federal court itself in Puerto Rico. Oklahoma Tax Comm'n v. Graham, 489 US 838 (1989); Franchise Tax Bd. v. Construction Laborers, 463 US 1 (1983); Gully v. First Nat. Bank, 299 US 109 (1936); Arkansas v. Kansas, 183 US 185 (1901); Hernández-Agosto v. Romero-Barceló, 748 F.2d 1 (1984). **The motion for removal, then, was not valid**.

Finally, the New Progressive Party Commissioner's motion for removal in the instant case had another incurable flaw.

Said motion was filed **late**, at a stage of the proceedings that made it **totally moot**. Indeed, federal case law is extremely clear when it comes to a defendant who does not request the removal of a case in a timely fashion, and continues to participate in the case at the state court level, such defendant, by his or her own acts, **waives** his or her right to seek the removal. Cantrell v. Great Republic Ins. Co., 872 F.2d 1249 (1989); Texas Wool & Mohair v. Standard Ins. Co., 175 F.2d 385 (1949); Zbranek v. Hofheinz, 727 Fed. Supp. 324 (1989). In the instant case, the New Progressive Party Commissioner participated in the lawsuit actively until he achieved precisely what he had requested: that the Court of First Instance, San Juan Superior Court, **dismiss the complaint against him**; that is, he participated from the beginning until the end of the proceedings in the lower forum. In light of that, he waived his right to seek the removal. He was absolutely barred from doing so. Custom Blending v. E.I. Dupont, 958 F. Supp. 288 (1997); Kam Hon v. Cigna Fire Underwriters, 933 F. Supp. 1060 (1996); Zilinge v. Allied Am Ins. Co., 957 F. Supp. 148 (1997); Thorp Fin. Corp. v. Lehrer, 587 F. Supp. 533 (1984). The federal courts consider such requests for removal as ***"patently improper."*** Ibid. And the renowned legal scholars on federal jurisdiction, professors Wright, Miller, and Cooper, have stated that:

> "A case may not be removed from a state to a federal court after the state court enters a final judgment that terminates the litigation."

14B *Federal Practice And Procedure*, p. 307 (1998).

In summary, then, the request for removal of the instant case did not have any valid foundation whatsoever; it was a **null** request, obviously filed in a crude attempt to sidestep our jurisdiction. The motion for removal in question was not intended to serve the legitimate purpose such petitions should serve but was, instead, intended to serve an illicit end that federal jurisprudence itself has repudiated. See, Carpenter v. Wichita Falls Independent School Dist., 44 F. 3d 362 (1995).

This Court could not disrespect itself and move forward with such an obviously unwarranted request that was only intended to obstruct the constitutional jurisdiction of this Forum.

The courts in Puerto Rico have always respected the provisions of the federal statute on removal and they must continue to do so. **Said statute is undoubtedly binding upon us**. But in the case at bar there was only a null motion for removal. The question is not as to the merits of such motion, but as to its nullity, for the reasons already explained. This was, then, a *sui generis* situation that required this Court to act as it did: in view of its nullity, we deemed it as not having been filed. Our action did not purport to undermine in any manner the legitimate authority of the federal court. It only sought to defend the integrity of this Court and its jurisdiction.

The split votes in question are to be **counted and adjudicated**, just as we ordered in our decision.

S/JAIME B. FUSTER-BERLINGERI
ASSOCIATE JUSTICE

CERTIFICATION BY TRANSLATOR

I, JANIS PALMA, an English-Spanish interpreter and translator certified to that effect by the Administrative Office of the United States Courts, and the National Association of Judiciary Interpreters and Translators (NAJIT), do hereby certify that I have translated the foregoing document and it is a true and accurate translation to the best of my knowledge and abilities. Janis Palma, USCCI, NCJIT

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
SAN JUAN JUDICIAL CENTER
SUPERIOR PART

1. JACQUELINE RODRIGUEZ JURATOVAC 2. LUIS OSCAR CASILLAS GONZALEZ 3. FELIX PLAUD DE CHOUDENS 4. LUZ ROSARIO FEBLES 5. RUBEN GARCIA AYALA 6. PORFIRIO DE JESUS AGRONT Plaintiff Vs. 1. COMMONWEALTH OF PUERTO RICO 2. STATE ELECTORAL COMMISSION THROUGH ITS PRESIDENT, AURELIO GRACIA';;MORALES 3. THOMAS RIVERA SCHATZ, ESQ., ELECTORAL COMMISSIONER OF THE NPP 4. JUAN DALMAU, ESQ., ELECTORAL COMMISSIONER OF THE PIP 5. GERARDO CRUZ, ELECTORAL COMMISSIONER OF THE PPD Defendants	CIVIL NO. KPE05-005 (907) RE: WRIT OF REVIEW IMPUGNATION OF ELECTION TO POSITION OF GOVERNOR

JUDGMENT

On January 11, 2005, the Petitioners filed a pro se "Request for Review/Impugnation of the Election to the Position of Governor", where they basically allege that the State Electoral Commission (CEE by its initials in Spanish incurred (Page 2) in error in certifying the election of Hon.

Aníbal Acevedo Vilá to the position of Governor in the general elections of November 2, 2004. In support thereof, they allege that the CEE infringed statutory provisions regarding the remittance of ballots for absentee votes, that inmates voted under coercion or intimidation and that the CEE did not investigate this; that the vote mixed designated as "Pivazos" is illegal, and that there occurred irregularities in several locations or precincts of the Island, which requires that the certification of the election of Governor be set aside.

In a timely manner, the CEE, the Commonwealth of Puerto Rico (ELA in Spanish) and the Electoral Commissioner of the Popular Democratic Party filed several motions for dismissal, where they questioned the standing of the petitioners to present or to maintain the appeal, because none of them have been candidates for the position of Governor. Furthermore, they indicated that the writ does not allege individual violations of the right to vote of the petitioners, therefore, they stated that the writ should be dismissed.

The case was scheduled for hearing on January 18, 2005, with Attorney Francisco González and Attorney Wilma Cadilla assuming the legal representation of the plaintiffs; they submitted an amended writ, with allegations identical to those stated in the original writ but excluding Mr. Félix Plaud De Choudens as a plaintiff. After verifying this in court with Mr. Plaud de Choudens, Partial Judgment was issued considering him as having dismissed his claim with prejudice.

Having attended said procedural matters, we granted to the Petitioners until January 20, 2005 at 9:00 am. to reply to the Motions for Dism~ssal, scheduling the case for discussion. On that date, the Petitioners filed an Opposition to the Requests for Dismissal and a Motion for Certification of Class Action, we heard the arguments of the parties on the motions filed, remaining the matter submitted for resolution.

Having studied the motions submitted and in light of the arguments stated during the hearing, this writ should be dismissed. Let us see.

I. IMPUGNATION OF THE POSITION OF GOVERNOR

The Electoral Law of Puerto Rico regulates the impugnation of an election as part of the procedures

subsequent to the voting. To that effect, and insofar as what is pertinent, Article 6.014 of the Electoral Law states:

Impugnation of an Election

> Any candidate who challenges the election of another should file before the Superior Court, within ten (10) days following the date of notification of the certification 'of the electoral results of each position in the general scrutiny, a writ stating under oath the reason or reasons on which the same are based, which should be of 'such nature that if proven, they would suffice to change the result of the election". (Emphasis ours). 32 L. P. R.A Sec. 3272.

As can be observed, the action of challenging the election is only available for the candidate or candidates who have not prevailed !in the election challenged. None of the petitioners was a candidate to the position of Governor.

The action of challenging an election was enacted in Puerto Rico through the Law of March 7, 1906, 1906 Laws of Puerto Rico 59. Since then, it has existed in one way or another in our laws, as part of the different electoral bodies and laws enacted since that date. To that effect, see Section 99 of the Law of Registration and Elections of 1919; 1919 Laws of Puerto Rico 613, Law 72 of May 4, 1931; Laws of Puerto Rico 449, Article 7.087 of Law No. 1 of February 13, 1974; Laws of Puerto Rico 91 and; Article 6.014, cited above, of the Electoral Law in effect, Law 4 of 20 of December of 1977.

When we study these precepts, our Supreme Court indicated in Granados Navedo v. Rodriguez Estrada, 124 D.P.R. 1, 18 (1989) " that all these laws... (have) a common requirement, which is to state under oath the reason or reasons on which they are based, which should be of such nature that, if proven, they would suffice to change the result of the election". Furthermore, it indicated, "the only ones with the

capacity to file the action (are) the defeated candidates". (Emphasis ours). This is the state of right, wherefore it is necessary to conclude that only the candidate or candidates defeated can challenge an election under Article 6.014 of the Electoral Law. Otherwise, a post-electoral chaos would be fostered.

As to who is a "candidate", Article 1,003 (4) of the Electoral Law provides that is it the "person that aspires to an an elective public position for a political party in the ballot of an election and up to ninety (90) days after having the same been held" 16 LPRA §3003 (4). Similarly, Article 1.003(5) of the Electoral Law defines "independent candidate" as "any person who without being a candidate of a political party aspires to an elective public position on the electoral ballot, in accordance with the provisions of this law", 16 6 LPRA §3003 (5). On its part, Rule 3 of the "Regulation for the General Elections and the General Scrutiny of 2004" adopts these definitions.

None of the petitioners was a candidate to the position of Governor for the general elections of November 2, 2004 therefore, none of them complies with the requirements of law to maintain an action of election challenge. It is pertinent to dismiss this writ. We would have reached the same conclusion had we considered it as an ordinary action, or as an appeal addressed .to attacking the decisions of the CEE.

II. ABSENTEE BALLOT

The petitioners allege that the CEE infringed the Electoral Law when they sent ballots out of term to voters that requested absentee ballot. Nevertheless, they do not assert having requested an absentee vote, having received ballots late, or that they were deprived of the right to vote for having received a ballot after the period of time provided by law.

III. VOTE BY INMATES

The petitioners sustain that inmates were coerced and intimidated, and that the CEE did not investigate this. Nevertheless, none of them alleges that were confined in any penal institution when the right to vote was exercised in the same, or that they were deprived of the right to vote because of this.

IV. VOTE DESIGNATED AS "PIVAZO"

Finally, the petitioners maintain that the ballot with three (3) marks designated as a "pivazo" is illegal due to faulty instructions) They do not state that they would have voted differently if the ballot had had different instructions.

Considering what has been stated, we resolve that they lack standing to file an ordinary action to question the extremes indicated. And with regard to the absentee ballot, the vote of inmates or the vote designated as a "Pivazo". It is pertinent then, to dismiss the writ for these reasons. It is pertinent, also, that attorneys fees be imposed. The writ is clearly frivolous.

Rule 44.1(d) of Civil Procedure states that "in the event that any party or his attorney have proceeded with recklessness or frivolity, the court should impose on the responsible party ands, in its Judgment the payment of an amount for attorney's fees' that the court understands correspond to said conduct", 32 LPRA App. III (1979).

The concept of "recklessness" impacts the procedure and affects the proper operation and the administration of justice. Elba A. B.' M. v. U.P.R., 125 D.P.R. 294, 329 (1990);

Fernandez v. San Jinn Cement Co. Inc., 118 D. P. R. 713, 718 (1987). It causes an action that could have been avoid or prolongs it unnecessarily. Santos Bermúdez v. Texaco Puerto Rico, Inc., 123 D.P.R. 351, 355-356 (1989). It exists when the law that governs the issue is so clear, that it is sufficient to apply it to the facts to be able to decide it without difficulty. Ramirez Anglada v. Club Cala Palmas, 123 D.P.R. 339, 350 (1985). That is the case herein.

The petitioners have challenged an election without having been candidates to the position of Governor, despite the fact that this requirement arises clearly from the law, the historic development of the action, and the interpretive jurisprudence of the same. On the other hand, the writ suffers from allegations indicative of violations to the personal rights of the petitioners. It disregards elementary standards of justiciability that have been firmly recognized. Noriega v. Hernández Colón, 135 D.P.R. 406, 421, 427 (1994); Fundación Arqueologica vs. Depto. de la Vivienda, 109 D.P.R. 387, 392 (1980). Lastly, it is contrary to binding rulined in our jurisdiction.

By way of example the plaintiffs challenge, under different theories, the legality of a mixed vote whose validity was recognized by our Supreme Court in Manuel Suarez v. Comisión Estatal de Elecciones, Op. of November 20, 2004 2004 J.T.S. 178, page 373, and in MaDuel Suarez v, Comisi6n Estatal de Eleccionos, Op. of December 23, 2004, 2004 J.T.S. 206. This was also recognized by the CEE, through a Resolution notified on November 15, 2004

(Appendix G of the Motion to Dismiss of the CEE) , which opinion, as stated by the CEE and the petitioners did not doubt, became final and binding on November 25, 2004 since it was not challenged as provided by Article 1.016 of the Electoral Law, as well as the Court of Appeals of the United States for the First Circuit. See: Rosselló v. Calderón, 393 F. 3d. 16 (11 Cir. 2004).

On the other hand, the petitioners allude to irregularities related to the vote of the inmates that were object of investigation and resolution in the CEE (Appendix D of the Motion to Dismiss of the CEE). The Resolution, as stated by the CEE in its motion to dismiss and not questioned by the petitioners, became final and binding because it was not challenged in a timely manner. Similarly, the CEE provided by regulation to count the absentee ballot as of the date the ballots were sent, thus attending any problem related to the date said ballots were sent. See Section 5,2 M "Regulation of Absentee Ballot" of July 7, 2004.

It is evident, therefore, that the petitioners have initiated and processed, in a reckless manner, a writ that for all purposes is frivolous, that warrants the imposition of attorneys fees.

Article 1.019 of the Electoral Law, 16 L.P.R.A. Sec. 3028 does not stand in the way of this. Said article exempts the payment of costs, stamps and duties to file legal actions pursuant to the Electoral Law. Thus, it facilitates access to the judicial forum to decide electoral matters which, as is known are vested with a high degree of public interest.

Nevertheless, it does not prohibit the imposition of attorneys fees when a, frivolous action has been filed. Nor is this prohibited by the Rules of Civil Procedure.

JUDGMENT

PURSUANT TO WHAT IS STATED ABOVE, the Court issues JUDGMENT dismissing the writ in its entirety. It imposes on each of the petitioners Jacqueline Rodriguez Juratovac, Luis Oscar Casillas González, Luz Rosario Febles, Rubén Garcia Ayala and Porfirio of Jesus Agront, the payment of $2,000 in attorneys fees.

RECORD AND NOTIFY.

Notify the attorneys and the Clerk of the Supreme Court, since the plaintiffs herein requested intervention in said higher judicial forum.

In San Juan, Puerto Rico, January 31, 2005

OSCAR DÁVILA SULIVERES SUPERIOR COURT JUDGE

I CERTIFY:

Rebecca Rivera Torres, Esq. Regional Clerk

By: Darlene Sánchez Rivera (illegible signature) Deputy Clerk

COMMONWEALTH OF PUERTO RICO
COURT OF APPEALS
SAN JUAN JUDICIAL REGION

JACQUELINE RODRÍGUEZ JURATOVAC, LUIS OSCAR CASILLAS GONZALEZ, FELIX PLAUD DE CHOUDENS, LUZ ROSARIO FEBLES, RUBEN GRACIA AYALA, PORFIRIO DE JESUS AGRONT Petitioners V. COMMONWEALTH OF PUERTO RICO, STATE ELECTORAL', COMMISSION through its President, AURELIO GRACIA MORALES, THOMAS RIVERA SCHATZ, ESQ., ELECTORAL COMMISSIONER OF THE NPP, JUAN DALMAU, ESQ., ELECTORAL COMMISSIONER OF THE PIP, GERARDO CRUZ, ELECTORAL COMMISSIONER OF THE PPD Appellants	CERTIORARI Originating from the Court of First Instance, San Juan Part KCLE 2005-0051 Case No. KPE 2005-0051 (Room 907) Re: Writ of Review Impugnation of the Election to the Position of Governor

Panel comprised by its president, Justice Peñagaricano Soler and Judges González Vargas and Sepúlveda Santiago and Sepúlveda Santiago, Presiding Judge

JUDGMENT

In San Juan, Puerto Rico, March 16, 2005.

Pursuant to this Writ of Certiorari, we are requested to review the judgment; issued by the Court of First Instance (hereinafter CFI), Superior Part of San Juan on January 31, 2005. In the same, the action filed by the petitioners related to the review and impugnation of the certification of the position of Governor. The court of first instance resolved on the basis that the petitioners lacked legal standing to file said action and proceeded to impose attorneys fees on each of them; Taking into consideration that none of the petitioners

complies with the requirements for legal standing necessary to open the doors of the courts nor are there any of the exceptions that would allow avoiding said doctrine present, we resolve that the lower court acted correctly.

I

The main facts of this appeal are summarized hereinafter. On November 2, 2004 "general elections in Puerto Rico were held. On December 27th 2004 the State Elections Commission (hereinafter CEE by its initials in Spanish) certified Atty. Aníbal Acevedo Vilá as governor. On January 11, 2005 the petitioners filed a complaint which they entitled "Writ of review and Impugnation of the Election to the position of Governor". In the same they alleged that the certification of the Governor had to be set aside for the following reasons:

That the CEE infringed statutory provision related to the remittance of ballots for the absentee vote, that the inmates voted under coercion or intimidation, that the mixed vote designated as "pivazos" is illegal and that there was fraud.

On January 18, 2005, the CEE, the Commonwealth of Puerto Rico (CWPR) and the! Electoral Commissioner of the Popular Democratic Party requested that the lower court dismiss the above captioned complaint since the plaintiffs lacked legal standing to file the appeal since none of them had been a candidate to Governor, as required by Art. 6.014 of the Electoral Law.

The CFI, after studying and analyzing the appearances of both parties and listening to their respective arguments, issued Judgment on January 31, 2005 dismissing the complaint. The court stated in its judgment that, pursuant to Art. 6.014 of the Electoral Law, supra, the action of impugnation of the elections is only available to those candidates who did not prevail in the elections that were contested. Since none of the petitioners was a candidate to

the governorship, the CFI decided that it was necessary to dismiss the complaint.

Furthermore, the CFI indicated that the petitioners also lacked legal standing to maintain the action as voters. Its reasoning was that they did not allege violations to their right to vote, but to the rights of third parties who were not nor are a party to the action. In a joint manner, the lower court deemed the action frivolous and that it was filed and processed in a reckless manner. Accordingly, it condemned each of the five petitioners to pay $2,000.00 in attorneys fees.

On January 31, 2,005, a copy of the notice of the Judgment was filed in the record. On February 10, 2005, the petitioners appealed; to this Forum.. They alleged that the determination of the CFI was incorrect in dismissing the writ of review and impugnation and concluding that the voters were not entitled to contest the result of an election or the actions of the State Elections Commission. Furthermore, they alleged that the finding of recklessness and the imposition of attorneys fees in a case regarding the violation of civil and electoral rights was incorrect.

Having evaluated the documents of all the parties and the voluminous appendixes submitted, we are in a position to resolve. We confirm.

Before being able to state the merits of this case, it corresponds to us, primarily, to decide if the petitioners can legally contest the certification of the Governor elected on the premise that the elections were fraught with fraud since:

(1) the ballots for the absentee vote were not sent pursuant to statutory provisions; (2) that some inmates allegedly voted under coercion or intimidation; and (3) that the mixed vote designated as "pivazos" were incorrectly awarded.

To successfully' invoke the power of judicial review, the parties who question', the constitutionality of a law or an administrative action have to have juridical capacity to promote the action. Noriega v. Hernández Colón, 135 D.P.R.

406, 422-21 (1994). This doctrine is known as standing in cause and when it pertains to the plaintiff, it is designated as legal standing. Col. Opticos de P.R. v. Vani Visual Center, 124 D.P.R. 559, 563 (1989). The determination of whether legal standing exists or not is one that is based mainly on the person that promotes the action and secondly on the issues to be 4 warded. Hernández Torres v. Hernández Colón, 129 D.P.R. 824 (1992).

This is a doctrine self-imposed by the courts that is geared to establishing boundaries to their own jurisdiction and that the court not enter into the domain of other branches of the government or resolve hypothetical issues or those alleged within an inadequate context of facts. Salas Soler v. Srio. De Agricultura 102 D.P.R. 716 (1974).

Pursuant to this doctrine, the petitioner of the action has to comply with certain requirements: (1) have suffered a clear and palpable damage; (2) the aforementioned damage is real, immediate and precise and not abstract or hypothetical; (3) there is a connection between the damage suffered and the cause of action exercised, and (4) the cause of action under arises under the mantle of the Constitution or of a law." Col. Peritos Elec. v. A.E.E., 150 D.P.R. 327, 331. To have legal standing, it is' not sufficient to satisfy some of these requirements, on the contrary, it is necessary to comply with all of them. Asociación de Maestros v. José Arsenio, 137 D.P.R. 528 (1994) ; Hernández Torres v. Hernández Colón, supra.

It is up to the petitioner of the action to demonstrate that it complies with these requirements. Col. 'ticos de P.R. v. Vani Visual Center, supra, at page 564. Nevertheless, the final determination will not be the result of an automatic intervention since the court will exercise its discretion depending on the transcendence of the right affected and the importance of the Aters5ts in conflict. Id., at pages 565 and 567.

The Supreme Court has repeatedly stated that to be able to determine if a plaintiff has legal standing to file an action he has to demonstrate that he has suffered a clear, palpable, real, immediate and precise damage, that is not abstract or hypothetical. García Oyla v. Junta de Calidad Ambiental, 142 D.P. R., 532 (1997); Col. Opticos de P.R. v. "ni Visual, supra; Pacheco Fraticcelli v. Cintrón Antonsanti, 122 D. P.R. 229, 237 (1988) ; Solis v. Wnicipio, 120 D. P.R. 53, 56 (1987); Salas Solar v. Srío. De Anicultura, supra, at page 719 (1984) In this case, as it appears from the file in the record, none of those that appear as petitioners requested the absentee vote in the previous elections, which means that they particularly were not deprived of the right to vote for receiving the ballot after the term provided by law, Furthermore none alleged to have been confined in a penal institution while the vote was being held, nor to have personally suffered from coercion or intimidation at the time of exercising their ',right to vote. Mostly the damages that the petitioners claim is based on the fact that their vote was diluted and reduced key the alleged aforementioned acts.

The petitioners 'cannot claim legal standing pursuant to generalized and abstract grievances common to all of the member of a community The alleged damage of a "diluted vote" that is claimed in this appeal is not concrete nor does it enjoy the characteristics of a clear and palpable damage in an area of interest protected by this right. The petitioners have not demonstrated to us that they comply with the first two requirements required by the doctrine of legal standing, which are sine qua non requirements to require the unconstitutionality of a law or an administrative action.

We are before a !situation where the petitioners claim abstract and hypothetical damages which prevent judicial intervention. We accept the statements issued by your Higher(Page 9) Forum in Fund. Arqueológica v. Depto. de la Vivienda, 109 demonstrate the negative implications D.P.R. 387 (1980), entailed by granting legal standing to the

petitioners in this case: "[a] llowing a plaintiff that does not allege an explicit damage, which requires that the Court resolve an important constitutional issue would create a potential for abuse of the judicial process, would distort the function of the Judicial Branch in its relationship with the executive and the legislative (branches)..."

Even though the general rule is that a litigant cannot attack the constitutionality of a law or an administrative action alleging that the constitutional rights of third parties which are not a party to the action were infringed, as an exception to the same and when there concur certain circumstances, in this jurisdiction a litigant is recognized standing to claim the constitutional rights of third parties. Zachry International v. Tribunal Superior, 104 D.P.R. 267 (1975).

Since it constitutes an exception to the method of adjudication followed up to the present by this Court with regard to constitutional issues, the situations when an action (Page 10) to defend the rights'; of third parties is invoked require that the petitioner satisfy with the most rigorous requirement the following four elements or factors that determine capacity.

Zachry International v. Tribunal Superior, supra. These are: (1) that the petitioner have a real interest in the controversy; (2) the nature of the right invoked; (3) the substantiality of the harmonious relationship between the claimant and the third parties, that is, that there exist a harmonious relationship between the juridical interests of the petitioner and the third party owner of the right; (4) the feasibility of the third parties being able to enforce their own rights, that is, there are obstacles that prevent, hinder or make it impractical, not feasible, for the third party to invoke its own right. Asoc. de Maestros v. Srio. de Educacion, 156 D.P.R. (2002); 2002 T.S.P.R. 58, 2002 J.T.S. 64.

The criteria to evaluate the interests of the litigating party are more rigorous if there is a desire to vindicate the

constitutional rights of third parties. E.L.A. v. P.R. Tel. Co., 114 D.P.R. 394 (1983). (Page 11)

III

According to the appearance itself of the petitioners, they appear to the court to claim "a personal right, not of third parties, but personal". They state their claim in the following terms: "[t,]he petitioners, as well as thousands of bona fide voters, have seen their votes diluted and diminished by the actions and omissions of the CEE, who even though the same apparently affects only other voters, they affect the right to vote of the Petitioners, because their votes are diluted by fraud an the violations of law reference to which is made in the writ of review/impugnation." Writ of Certiorari, page 18.

From the letter !,itself it appears that we are not before an action where there is an intention to vindicate the free and voluntary right to vote that has been granted to the inmates or that it seeks to defend the rights of those who were allegedly barred from exercising the so-called absentee vote. The discussion of said rights is collateral to the principal claim. What the petitioners primarily intend with this appeal is to claim "their own" right to universal suffrage based on their vote having been diminished by alleged (Page 12) irregularities that' occurred during the elections. Said damage, as we stated, is rife with generalization, abstraction and hypothesis.

We are not before an action where the litigants can be exempted from complying with the requirements of the doctrine of legal standing because they are claiming the rights of third parties. The ;discussion of the rights of the inmates and of the absentee voters is mostly incidental. Furthermore, the petitioners have hot placed us in a condition to determine that the electros whose absentee right to vote were infringed were barred from claiming the vindication of their rights personally or through a class action. Furthermore, the coercion and intimidation that some inmates allegedly suffered at the time of exercising their right to vote was

subject to evaluation and adjudication on the merits by the CEE through resolution issued on December 20, 2004. In the same the Commission concluded that "the evidence presented is insufficient as a matter of law to annul the vote of these voters. The evidence received by this Commission does not satisfy the legal criteria of clear, robust and convincing evidence that is required to decree the (Page 13) nullification of the vote of the voters [inmates]." Appendix, page 192.

It is a standard of law that the courts must defer to the interpretations made ';by the agencies of the laws that they are charged with implementing. Associate Insurance v. Comisionado, 144 D.P.R. 425, 436 (1997). To warrant this deference it is not essential that the interpretation of the agency be the only one possible, it is sufficient that it be reasonable and compatible with the legislative purpose. Vázquez v. ARPE, 128'; D.P.R. 513, 524 (1992). It involves another party in a matter already awarded, with res judicata effect. See Rodriguez v. Colberg, 131 D.P.R 212 (1989).

IV

The petitioners allege that their right to file this writ originates from Article 2.001 of the Electoral Law, Law No. 4 of December 20, 1977, as amended, 16 L.P.R.A. section 3051.

This section of the law provides in what is pertinent that: [t]o that effect this subtitle grants the voters the capacity to initiate or promote any legal actions pursuant to this Declaration of Rights and Prerogatives of the Voters before the corresponding Court of First Instance." Id. This(14) provision creates a cause of judicial action in favor of any voter who understands that the state or the political parties have violated any of the rights recognized by the Declaration of Rights and Prerogatives of the Voters.

This Declaration consigns the following rights:

(1) The administration of the electoral organisms of the Commonwealth of Puerto Rico within a framework of strict impartiality, purity and justice;

(2) the guarantee to each person of the equal, free, direct and secret right to vote;

(3) The right of the citizen to vote totally, mixed vote and to an independent vote under equal conditions in each case;

(4) The right of the voter to participate in the inscription of parties and in the inscription of independent candidates;

(5) The right of the affiliated voters to participate in the formulation of the internal regulations and pragmatic basis of their respective political parties, as well as in the election processes of their candidacies; (Page 15)

(6) The right of every affiliated voter to dissent with regard to the issues of their respective political collectivity that is not pragmatic or regulatory in nature; (7) The right of the affiliated voters to due process in all internal disciplinary procedure, as well as in the deliberative procedures and decisions of their parties;

(8) The right of the affiliated voter that aspires to a candidacy to request the primaries of his party and the celebration of the same pursuant to the guarantees, rights and procedures established in this subtitle;

(9) The right of the affiliated voter to receive information with regard to the use that their party gives to the funds in the same,

(10) The right of the free issuance of the vote and that it be counted and awarded in the manner that the voter issues the same.

(11) [That their prevail] the electoral rights of the citizen on the rights and prerogatives of all political parties and groups.

In those cases where the legislative power statutorily grants a cause of action to certain persons of entities, such (Page 16) as the case of the previous statute, the litigants could allege a general damage shared by all of the citizens. This exception to legal standing occurs by virtue of the fact that in these

situations the danger entailed by the judicial review of the laws and administrative actions is not present. Nevertheless, it is' indispensable that the petitioner of the action have some interest in the action and be affected by the action challenged. Salas Soler v. Secretario, 102 D.P.R. 716 (1974)

The petitioners base their claims on clause number 2 of the transcribed Declaration of Power and Prerogatives of the voters which guarantee the right to an equal, free, direct and secret vote Writ of Certiorari, page 18. In particular, the petitioners argue that their right to an equal vote was "dil·ıted and adversely affected by the existence of fraud, even though the exercise of this right was not denied to the claiming voter." Id., The petitioners pose the theory that the votes were not awarded in an equal manner when the mixed voted designated as "pivazos" were considered valid.

The validity of the adjudication of the so-called "pivazo" vote was subject to analysis and consideration by the (Page 17) CEE and was validated by the Supreme Court in the case of Manuel Suárez v. Comisión Estatal de Elecciones; resolved on ·2004, November 20, D.P.R. (2004), 2004 T.S.P.R. 2004 J. T. S. 178 and Manuel Suárez v. Comisión Estatal de Elecciones, resolved on December 23, 2004, D.P.R. _ (2004), 2004 T.S.P.R. 2004 J,T.S. 206. The decision of the Supreme Court in the previous cases became final and binding and the determination that w4s made in the same has a force of law. The doctrine of stare decisis has the effect that when the courts have already established a principle of law applicable to a certain situation of facts, they will adhere to said principle and will apply it to all future cases when the facts of the same are the same or substantially the same. See, I. Rivera García, Diccionario de Términos "Adicos, Equity, page 409 (1976).

The petitioners admit that the case of Manuel Suárez v. Comisión Estatal de Mociones, sMra, and this case "involve the same facts",

Writ of Certiorari, page 18. They argue that the difference in the; cases lies in that the Supreme Court erred in not considering the federal statute known as "Help (Page 18) America Vote Act" (HAVA) in adjudicating the controversy regarding the "pivazos", which to their understanding invalidates the mixed vote under examination.

Under the Constitution of the Commonwealth of Puerto Rico, the Supreme Court, as the forum of last instance, is the onl y one whose rulings and decisions can originate the doctrine of the application of judicial precedent - stare decisis. This constitutional attribute is interrelated to the unified judicial system that governs in our system of law. Sec. 2, Art. V, Constitution,. *In Re Designación Comité Especial Secretariado de la Conferencia Judicial*, 131 D.P.R. 526 (1992)

We find no reason to validate a judicial action based on the Electoral Law regarding a matter that was already awarded and validated. According to the verifications that exist in the record of this case, there is no reason that justifies not applying to this case what was decided by the Supreme Court.

V

Having resolved the above, there only remains the discussion of the last indication of error that the Petitioners allege with regard to the imposition of attorneys fees.

In our jurisdiction, the imposition of attorney's fees is only pertinent when a party has incurred in recklessness. Attorneys fees are considered as a "sanction addressed to the party who with its reckless attitude has acted unreasonably or in an extremely litigious manner, affirming facts or acting without grounds or reason." *Feliciano Polanco v. Feliciano González*, 147 D.P.R. 722, 729 (1994). A party who "'has obligated the other party [sic] to incur in unnecessary expenses by filing frivolous actions, or unnecessarily alleging those already submitted to the consideration of the courts, or

which provokes that it incur [sic] in avoidable efforts." *Dominguez v. G.A. Life*, 157 D.P.R. _ (2002); 2002 T.S.P.R. 104; 2202 J.T.S. 110.

The Supreme Court has repeatedly indicated that the determination of said behavior lies in the sound discretion of the court of first instance, or for which the appellate forums will not review said determination in the absence of abuse of discretion by the sentencing court. *Asociación de Condómines v Trelles Reyes*, 120 D.P.R. 571 (1988); *Fernádez v. San Juan Cement Co., Inc.*, 118 D.P.R. 713 (1987); *Montañez Cruz v. Metropolitan Cons. Corp.* , 87 D. P.R. 35, 40 (1962) ; *Elba A.B.M. v. U.P.R.*, supra; *Corpack Art Printing v. Ramallo Brothers*, 125 D.P.R. 724 (1990).

Having examined the files of the case, we conclude that the court of first instance did not exceed its discretion to grant attorneys fees. The petitioners, with the filing of (the following two lines are not contained in the original) in alleging that which has already been submitted to the consideration of the courts and the Commission.

Since it does not arise from the record that the sentencing judge acted moved by passion, prejudice or partiality, it is pertinent that we confirm the same.

Based on what is stated above and having resolved that the petitioners do not comply with the requirements of legal standing nor are the conditions that allow the evasion of said doctrine present, we confirm.

Thus was agreed and ordered by the Court and certified by the General Clerk.

(illegible signature)

S/Laura Vélez Vélez, Esq, Clerk of the Court of Appeals

CERTIFIED to be true and correct translation from its original.
AIDA TORRES, CERTIFIED INTERPRETER
ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT. 3/23/05

IN THE SUPREME COURT OF PUERTO RICO

Manuel R. ("Manny") Suárez, et al.

Plaintiff-Appellant

CT-2004-0004
Certification

v.

State Elections Commission, et al.

Defendants-Appellees

PER CURIAM

San Juan, Puerto Rico, November 20, 2004.

We are called upon to decide whether those state ballots in the November 2, 2004 elections on which voters issued a vote by placing a mark under the emblem of the Puerto Rican Independence Party (hereinafter P.I.P.), another one in favor of Aníbal Acevedo-Vilá as the Gubernatorial candidate for the Popular Democratic Party (hereinafter P.D.P.), and another one in favor of Roberto Prats-Palerm, Esq., as the aforesaid political party's Resident Commissioner candidate.

I.

The material facts are not at issue. Last November 2, 2004, general elections were held in Puerto Rico. Following the initial count, and pursuant to the mandate established in Art. 6.007 of the Puerto Rico Electoral Act, Public Law No. 4 enacted December 20, 1977, 16 L.P.R.A. sec. 301 et seq. (hereinafter the Puerto Rico Electoral Act), the State Elections Commission certified P.P.D. candidate Aníbal Acevedo-Vilá, Esq., on a preliminary basis, as the Governor-elect. On November 12, 2004, the S.E.C. began the general canvass to officially certify the candidates-elect in these past elections.

Once that procedure had begun, the Electoral Commissioner for the N.P.P., Thomas Rivera-Schatz, contested the validity of all those ballots on which the voters cast a vote under the P.I.P. emblem and, in turn, cast their vote for Mr. Aníbal Acevedo-Vilá as the Gubernatorial

candidate and Mr. Roberto Prats-Palerm as the Resident Commissioner candidate. In Mr. Rivera-Schatz' judgment, under these circumstances those votes are null, inasmuch as there is no way to determine the voters' intentions.

The P.D.P.'s Electoral Commissioner, Gerardo Cruz-Maldonado, objected to this petition. He felt that the contested vote should be considered a split vote. Eventually, and with the opposition of the N.P.P.'s Electoral Commissioner, the President of the S.E.C., Aurelio Gracia-Morales, ruled that this was a split-ticket ballot and that it was proper to adjudicate it as such.

Subsequently, Mr. Manuel R. ("Manny") Suárez-Jiménez and a group of voters who cast the type of vote at issue (hereinafter Mr. Suárez-Jiménez), turned to the Court of First Instance, San Juan Superior Court, through a motion for declaratory judgment and injunction, praying, in essence, for said forum to rule on the validity of their votes. In opposition thereto, N.P.P. Electoral Commissioner Thomas Rivera-Schatz, prayed for the dismissal of the complaint on the grounds that the court lacked jurisdiction there being no genuine controversy, since the S.E.C. had ruled that the split-ticket votes which were the subject of the controversy were valid. Having heard the parties' arguments, the Court of First Instance ordered in open court the dismissal of the lawsuit without prejudice.1

Mr. Suárez-Jiménez disagreed, and under the provisions of Art. 3.003(e) of the 2003 Judiciary Act, Public Law No. 201 enacted August 22, 2003, and Rule 23 of the Puerto Rico Supreme Court Regulations, 4 L.P.R.A. Ap. XXI-A, he turned to this Court on November 17, 2004, through a Petition for certification. In essence, he argues that the lower court erred when it failed to grant the provisional remedies to safeguard the votes of those voters who cast one vote under the emblem of the Puerto Rican Independence Party and, in turn, granted a vote to Aníbal

1 - Subsequently, at the request of plaintiffs and the motion for certification having been filed, the lower court issued its judgment in writing.

Acevedo-Vilá as the Gubernatorial candidate, and in favor of Roberto Prats-Palerm as the Resident Commissioner candidate, as he did. Following the filing of the Petition for Certification, we issued an Order granting the parties a term in which to state their positions as to whether our intervention was warranted and as to the merits of petitioners' allegations. In view of this, and with the benefit of appearances by the parties, we now rule.

II.

In accordance with Art. 3.002 of the 2003 Judiciary Act, supra, this Court has jurisdiction to intervene through a certification order in matters pending before the Court of First Instance and before the Appellate Court "when [...] new issues of law or issues of high public interest are raised, including any substantial constitutional issue based on the Commonwealth of Puerto Rico Constitution or the United States Constitution". 4 L.P.R.A. Constitution". 4 L.P.R.A. § 24(s)(e). See, also, Rule 23 of the Regulations of this Court, supra.

In the instant case, the petition for certification was filed with us after the lower court announced a decision in open court. The matter was pending before that court when petitioner came directly before us praying for certification of the case. Considering the importance of the matter and the public's interest in having the Court intervene directly in the adjudication of an issue of law, the certification is in order.

In adjudicating this motion we start from the premise that this Court has the constitutional obligation to rule on a controversy such as the one at bar, involving the fundamental right to suffrage under a purely state-level legal system. While we are aware that in the United States District Court for the District of Puerto Rico a case is being heard involving

a controversy over the November 2, 2004 electoral process, our decision is based exclusively on the Commonwealth of Puerto Rico Constitution and on the statutory and regulatory provisions of our jurisdiction. As the ultimate custodians and interpreters of our legal system, we shall not abdicate our constitutional obligation. P.S.P. v. C.E.E., 110 D.P.R. 538, 541 (1980),

("This Supreme Court cannot abdicate its constitutional functions in the face of actions utterly lacking a legal basis in light of the applicable Federal case law itself".)

III

A

Mr. Suárez-Jiménez filed a motion for declaratory judgment before the lower court under Rule 59.1 of Civil Procedure. 32 L.P.R.A. Ap. III, R. 59.1. This rule provides that, "[t]he Court of First Instance shall have the authority to declare rights, conditions and other legal relationships even though another remedy is or may be sought". Id. (Emphasis added.)

Likewise, in its pertinent portion, it provides that:

> [a]nyone [...] whose rights [...] are affected by a statute [...] may pray for a decision regarding any divergence in the construction or validity of said statutes [...] and in addition, for a finding to be issued as to the rights, conditions or other legal relationships from which the former are derived. Rule 59.2 of the Rules of Civil Procedure; 32 L.P.R.A. Ap. III, R. 59.2.

Therefore, a "declaratory judgment is that which is entered in a process wherein the facts alleged show that there is a substantial controversy between parties having adverse legal interests, having suffered no prior injury thereto, for the purpose of dissipating the legal uncertainty and contributing to social peace". R. Hernández-Colón, Derecho Procesal Civil, Michie de Puerto Rico Pub., 1997, at p. 448.

The aim of Rule 59 of Civil Procedure, supra, which

regulates matters relating to declaratory judgments, is to provide citizens with a procedural mechanism of a remedial nature by which the merits of any claim latently holding a potential danger against them may be decided. Charana v. Pueblo, 109 D.P.R. 641, 653 (1980).

Likewise, we have expressed our opinion on several occasions to the effect that the declaratory judgment is the appropriate mechanism to adjudicate controversies of a constitutional nature, Asociación de Periodistas v. González, 127 D.P.R. 704 (1991) and, pursuant to the prevailing doctrine, should be used when it allows for a resolution to situations of uncertainty or insecurity as to given rights. On this issue the courts have said that:

> The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from uncertainty, insecurity, and controversy giving rise to the proceeding. Wright and Miller, Federal Practice and Procedure, West Pub., 1998, p. 543. (Emphasis added).

This being the case, we have no doubt that in the instant case the intervention of this forum was warranted in order to clarify a legal uncertainty as to the rights of voters who cast their votes in a particular way, and who run the risk of not having their votes counted, because in spite of the decision by the S.E.C. to count those votes, we do take judicial notice of the prevailing uncertainty as to the appropriateness of that decision.

The instant lawsuit requires, then, an adjudicative action concerning the validity of one particular way of casting a vote, in light of Puerto Rico statutes, a subject matter that, as is well known, is the exclusively province of the Puerto Rico courts. Moreover, the instant controversy requires our prompt attention to bring certainty and finality into the uncertainty

that prevails in this regard: "This certainty and finality can only be given by the Puerto Rico Supreme Court". Báez-Galib v. Comisión Estatal de Elecciones, Des. of November 2, 2000, 2000 T.S.P.R. 161.

Having clarified this, we shall now go over the statutory and case law principles governing the matter.

B.

When pondering the merits of the instant case, we begin with two inescapable premises. First, suffrage, as an individual and collective statement, holds a place in our legal system of the very highest order that binds the courts to grant it the utmost protection. And second, in the face of any possible ambiguity or loophole in the statutory or regulatory provisions controlling the right to vote, the interpretation adopted should prioritize the utmost protection of such right. PPD v. Barreto, 111 D.P.R. 199, 260 (1981). See also Granados v. Rodríguez Estrada, 123 D.P.R. 1 (1988); Santos v. CEE, 111 D.P.R.: 351 (1981); PSP v. CEE, 110 D.P.R. 400 (1980). In this sense we reaffirm the principles of statutory interpretation we set forth on electoral matters in P.S.P. v. C.E.E., 110 D.P.R. 400 (1980), as follows:

> ...[upon evaluating a vote] the primary rule should be to evaluate it with the utmost respect for the will of the voter and making the optimum effort to safeguard his or her intention if such intention is supported by an examination of the ballot, setting aside failures of a formal nature to follow certain rules which, in the exercise of reasonable understanding, do not hide or entangle in confusion the voter's genuine intention. Id. at p. 450, (emphasis added).

The foregoing having been clarified, let us examine the controversy raised before us. Navedo v. Rodríguez Estrada I, 123 D.P.R. 1 (1988); PNP v.

C.

Mr. Suárez-Jiménez holds that, in recent days, and in various fora, the validity of those ballots containing a mark

under the emblem of the P.I.P. and on which, in addition, a mark was included in favor of Aníbal Acevedo-Vilá as Gubernatorial candidate and another one in favor of Roberto Prats-Palerm as a Resident Commissioner candidate, has been brought into question by the Electoral Commissioner of the New Progressive Party, Thomas Rivera-Schatz. He points out that the N.P.P. Electoral Commissioner has alleged that said ballots are null, inasmuch as the split vote is that in which a vote is cast under the emblem of a political party, and in addition, the voter has the right to vote for one Gubernatorial candidate or one Resident Commissioner candidate.

Art. 5.028 of the Puerto Rico Electoral Act, Public Law No. 4 enacted December 20, 1977, et seq. (hereinafter Puerto Rico Electoral Law) sets forth that before the 2004 General Elections, the Puerto Rico State Elections Commission had to establish, through regulation, the manner in which voters were to mark their ballots for the purpose of signifying their vote thereon. According to the law, this method for marking the ballot should be as simple as possible, in accordance with the design of the ballot, and should allow for the exercise of a straight-ticket or split-ticket vote.

Pursuant thereto, on July 2, 2004, the S.E.C. approved the Regulations for the 2004 General Elections and General Vote Canvassing (hereinafter General Elections Regulations). In particular, Rule 50 of said Regulations establishes, in its pertinent portion, that voters could vote in any of the following ways during the Tuesday, November 2, 2004, general elections, to wit:

> Split-Ticket Vote: When the voter fills in the circle, places an "X" or a mark of any shape and size within the box with the emblem for the political party of his or her preference, and further places an "X" or individual mark in the box with the name of one or more candidates under the columns of other political parties, or independent candidates, or writes the names of persons who are not

> shown as candidates under the Write-In ["Direct Nomination"] column. (Emphasis added.)

That is, according to the portion pertinent to the matter before us, a "Split-Ticket Ballot" is one on which the voter casts his or her vote by marking the electoral ballot individually or in combination with a mark for the emblem of a party, any combination of candidates, be they from the same party or independent, or by including names not featured on the ballot. Art. 1.003 of the Puerto Rico Electoral Act, Public Law No. 4 enacted December 4, 1977.

> On the other hand, the instructions on how to cast a split-ticket vote contained on the State Electoral Ballot, handed out to the voters on November 2, 2004, state in their pertinent portion that to cast a split-ticket vote on said ballot:
>
> [a] valid mark (X) is made below the emblem of the party of your preference and a mark is made next to another candidate outside the column of your party, or you write in the name of another person of your preference under the corresponding position, in the last Write-In ["Direct Nomination"] column. Keep in mind that you may only vote for one (1) Gubernatorial candidate and one (1) Resident Commissioner candidate. (Emphasis added).

We can deduce from the foregoing that the split vote on this ballot is conceived in such a way as to allow for a vote in which the voter casts a vote under the emblem of a political party, and in addition, votes for a Gubernatorial candidate and for a Resident Commissioner Candidate.2

In fact, voters were given orientation through the country's mass media (newspapers, radio, television, and on the S.E.C.'s web page, www.ceepur.org), regarding the fact that this type of vote was completely valid. By way of example, the model advertisement published by the S.E.C. in the country's

general circulation newspapers, of which we take judicial notice, established the following, in its pertinent portion:

2 Had the intention of the S.E.C. members been otherwise, the following would have been featured on the ballot as a warning to voters: "Keep in mind that you may only vote for one (1) Gubernatorial candidate or one (1) Resident Commissioner candidate".

HOW DO I CAST A SPLIT VOTE?

If in addition to voting under a party's emblem, you have a preference for one or more candidates from other parties for one or more offices, or for an independent candidate, you may place a valid mark in the blank space that appears to the left of the name of the candidate you prefer, outside the column for your party. You may also vote for other persons of your preference who are not shown as candidates, by writing their name under the corresponding position in the "Write-In ["Direct Nomination"] Vote" column. Keep in mind that you may only vote for one candidate for each position, including a single candidate for Representative and Senator At Large, except for District Senators, where you may vote for two (2) candidates because there are two (2) positions for each district. Each vote expressly marked shall count only for the candidate marked and not for the candidate to the same position for the party to which you have given your vote. If you vote for more than the number of candidates to which you are entitled for each position, you annul the vote for that position. (Emphasis in the original.)

In view of this, we can have no doubt as to the validity of that split-ticket vote wherein voters cast a vote under the P.I.P. emblem, and granted a vote in favor of Aníbal Acevedo-Vilá as a Gubernatorial candidate and a vote in favor of Roberto Prats-Palerm as a Resident Commissioner candidate. The Electoral Act, Regulations and the instructions on the State Electoral Ballot allow for this.

The split vote, under circumstances such as those now before us, protects the interests of those voters who wish for the political party to which they belong to remain registered, independently of whether or not the party's candidates for office are elected or not. That is to say, a vote under the emblem of a political party on the state ballot has an independent value that is not tied to the election of any candidate.

Art. 3.001, Paragraph 1, of the Puerto Rico Electoral Act, supra, establishes that:

> (1) Any unallied party that during the preceding general elections obtained a number of votes of no less than seven (7) percent of the total votes cast for all party emblems, in the box corresponding to its emblem on the Governor and Resident Commissioner ballot, or that during the preceding general elections obtained a number of no less than three (3) percent of the total straight-party ballots cast for all parties on the ballot for Governor and Resident Commissioner; or whose Gubernatorial candidate obtained, in the preceding general election, a number of no less than five (5) percent of the total votes cast for all candidates for that position shall be deemed to be a "Major Party". In the case of allied parties, the determination of the status as a major party shall be made individually for each of those comprising the alliance, requiring that each obtain the aforesaid number of votes, marked for its Gubernatorial candidate, for its emblem, or straight-ticket ballot which it would have held on the electoral ballot as a distinct party separate from the others. (Emphasis added.)

Certainly, our ruling here regarding the split-ticket vote is consistent with the provisions of the Electoral Act and the criteria for the adjudication of this type of vote set forth in Rule 81 of the Regulations for the General Elections. This legal provision establishes, in this sense, that:

When a voter casting a split vote places a mark inside the

box with the name of a Gubernatorial candidate under a column other than the one where he or she placed the mark for the political party emblem, or writes a name in the write-in ["direct nomination"] column for governor; the gubernatorial candidate directly marked or written in gains one vote, while the gubernatorial candidate under the emblem for which that voter voted, loses one vote.

This same criterion applies whenever the mark is for a Resident Commissioner candidate other than the one appearing below the emblem under which the voter cast his or her vote.

Likewise, the procedure to adjudicate split ballots contemplated in Rule 64 of the Regulations for the General Elections establishes that:

...

Split ballots for one political party have the effect of taking votes away from one or more candidates of the political party itself. Said votes are won by candidates from other political parties, or independents or candidates included by the voter under a Write-In ["Direct Nomination"] vote. They may also be won by candidates from the same political party in at large positions when a position other than the first of said legislators is marked.

...

One vote is to be added for each candidate who earns it, by placing a tally mark in the box for the votes earned by said candidate, which is reflected in the Polling Station Report with a "plus" sign (+).

As soon as one (1) vote is added to the candidate who earns it, one (1) vote must be subtracted from the candidate who lost it, i.e., from the candidate of the political party under which the vote was cast. This subtracting shall be done by placing a tally mark in the box for votes lost, which is the one appearing with a "minus" sign (-) on the Canvassing Tally Sheet.

In light of the foregoing, we may conclude that on the ballot at issue —where voters cast a vote under the P.I.P. emblem and in addition, granted a vote in favor of Aníbal Acevedo-Vilá as the Gubernatorial candidate and a vote in favor of Roberto Prats-Palerm as the Resident Commissioner candidate– – the P.I.P. earns one vote to qualify as a major party under the 7% "of the total of votes cast for all party emblems" formula, as provided by the Puerto Rico Electoral Act. Nevertheless, those votes are lost by its Gubernatorial and Residential Commissioner candidates, to wit, Rubén Berríos-Martínez and Edwin Irizarry-Mora. Said votes are added to the P.D.P. candidates for the aforesaid positions.

This analysis clearly reveals the voters' intent to prevent the automatic effect provided by law for marks made under an emblem. They opted for another alternative contemplated in the Act itself, intended to keep the P.I.P. registered while, simultaneously, voting for other party candidates, in this case, the P.D.P.'s. To undermine that intention would run counter to the Puerto Rican electoral design which clearly aspires to "count each vote in the way and manner in which it was cast". Art. 1.002 of the Puerto Rico Electoral Act.

That design we have described evidences how both the State Elections Commission Regulations and the 2004 General Elections Procedures Manual have established a uniform mechanism by which to adjudicate votes in both the canvass and the recount, as well as how to handle straight ballots, recused ballots, split-ballots, and recused split ballots or contested ballots. This mechanism is predicated on the principle that all ballots that are equally situated are to receive the same treatment and shall be adjudicated in the same manner. In this way, the possibility of arbitrariness and the existence of divergent standards are avoided during a canvass or recount, thus guaranteeing voters their right to vote.

IV.

Although the persons affected have not raised the issue of

administrative bodies refusing to take the necessary measures to expedite the general ballot-by-ballot canvass of the total votes cast in the elections, in order for this process to end within a reasonable time period before the deadline imposed by law for the candidates-elect to take office in their various positions, nor the fact that they may have refused to take precautionary measures for the security and transparency of the recount process, we can perceive an uncertainty, restlessness and sense of unease among the citizenry who are justifiably concerned over the integrity of the vote cast by each voter.

In order to bring some peace of mind to the People of Puerto Rico, this Court orders the State Elections Commission, an official organism comprised of its President and an Electoral Commissioner representing each one of the major political parties, to immediately commence the recount of those votes, together with the vote canvassing.

By taking this course of action, we are standing by our pronouncements of approximately two decades ago, when in P.P.D. v. Barreto Pérez, supra, at p. 387, we stated that:

> The country is going through moments of great difficulty and tension. Under these trying circumstances, it is indispensable that we act with serenity and sensitivity. The vital thing is for the people of Puerto Rico as a whole to triumph; that the quality of its democracy not be reduced nor the cleanliness of its electoral processes be stained; that our Constitution and our laws be scrupulously respected. We make a call to the country to maintain the utmost calm and restraint at all times. (Emphasis added.)

V.

On the grounds set forth in the preceding Opinion, the writ of certification is issued and we find that the votes cast on the state ballot containing an "X" under one of the party emblems Gubernatorial and Resident Commissioner candidates from other political parties are valid. To rule

otherwise would imply a contravention of Puerto Rico's electoral system in detriment to the constitutional right to suffrage.

Pursuant to the foregoing, and absent other circumstances, the S.E.C., its President, Aurelio Gracia-Morales, the Electoral Commissioners and all its officials, are hereby ordered to count and adjudicate as valid all ballots marked in that manner by the voters. Once they have been adjudicated, pursuant to this order, they are to be separated and duly preserved for all pertinent legal purposes.

The S.E.C., its President, Aurelio Gracia-Morales, the Electoral Commissioners and all its officials, are further ordered to immediately commence the electoral recount.

And an in each of the boxes corresponding to the

The corresponding Judgment shall be entered.

IN THE PUERTO RICO SUPREME COURT

Manuel R. ("Manny") Suárez, et als.

Plaintiff-Appellants

v.

State Elections Commission, et als.

Defendants-Appellees

No. CT-2004-0004 Certification

JUDGMENT

San Juan, Puerto Rico, on November 20, 2004.

On the grounds set forth in the preceding Opinion, the certification writ is issued and we rule that the votes cast on the state ballot containing an "X" under one of the party emblems and an "X" in each of the boxes corresponding to the Gubernatorial and Resident Commissioner candidates from other political parties are valid.

Pursuant to the foregoing, and absent other circumstances, the S.E.C., its President, Aurelio Gracia-Morales, the Electoral Commissioners and all its officials, are ordered to count and adjudicate as valid all ballots marked in that manner by the voters. Once they have been adjudicated, pursuant to this order, they are to be separated and duly preserved for all pertinent legal purposes.

The State Elections Commission, its President, Aurelio Gracia-Morales, the Electoral Commissioners and all its officials, are further ordered to immediately commence the vote recount.

Notice hereof to be served in person and through the ordinary means to all the parties.

So stated and so ordered by the Court and so certified by the Clerk of the Supreme Court. Associate Justice Fuster-Berlingeri issued a Concurring Opinion. "Associate Justices Rebollo-López, Corrada del Río and Rivera-Pérez –though each one individually having Dissenting Opinions prepared and ready to be certified -- did not participate and are not

publishing their position statements at this stage of the proceedings, in view of the fact that a Notice of Removal has been filed in the instant case by one of the parties before the United States District Court for the District of Puerto Rico, which removal notice by express mandate of a federal statute applicable to Puerto Rico, to wit: 28 U.S.C.A. 1446(d), orders the automatic stay of the court proceedings at the local and state levels and deprives the local forum of jurisdiction. The actions of the majority are futile, inofficious, and not binding.

Nevertheless, Associate Justices Rebollo-López, Corrada del Río and Rivera-Pérez, individual Dissenting reserve the right to publish their Opinions once definitively been a rule on the Notice of Removal.

[signature]

S/Patricia Otón-Olivieri Clerk of the Supreme Court of Puerto Rico.

CERTIFICATION BY TRANSLATOR

I, JANIS PALMA, an English-Spanish interpreter and translator certified to that effect by the Administrative Office of the United States Courts, and the National Association of Judiciary Interpreters and Translators (NAJIT), do hereby certify that I have translated the foregoing document with the assistance of Thomas H. Kavelin, USCCI, who provided his own certified translation for my use and review, and it is a true and accurate translation to the best of my knowledge and abilities.

S/Janis Palma, USCCI NCJIT-S

AT THE SUPREME COURT OF PUERTO RICO
Jacqueline Rodríguez Juratovac,
Luis Oscar Booths González,
Luz Rosary Febles,
Ruben Garcia Ayala,
Porfirio of Jesus Agront, et al
Plaintiffs-Petitioners Núm. CT-2005-3
vs.
Commonwealth of Puerto Rico, State Elections Commission et al Defendants-Appellees

RESOLUTION

San Juan, Puerto Rico, April 22, 2005

Having considered the appeal filed as one of certiorari, it is Denied.
The Court thus agreed and it is certified by the Clerk of the Supreme Court. Associate Justices Mister Rivera Perez and Mrs. Fiol Matta did not intervene.

Aida Ileana Oquendo Graulau
Clerk of the Supreme Court

AT THE SUPREME COURT OF PUERTO RICO
Jacqueline Rodriguez Juratovac,
Luis Oscar Booths González,
Luz Rosary Febles,
Ruben Garcia Ayala,
Porfirio of Jesus Agront, et al
Plaintiffs-Petitioners Núm. CT-2005-3

vs.

Commonwealth of Puerto Rico, State Elections Commission et al Defendants-Appellees

NOTIFICATION

I HEREBY CERTIFY THAT WITH REGARDS TO THE PETITION FOR CERTIORARI THE COURT HAS ISSUED THE FOLLOWING RESOLUTION:

DEL VALLE CRUZ CARLOS A [LIC.]
P.O. BOX 9020192-SAN JUAN PR
00902-0192

CADILLA VAZQUEZ WILMA [LIC.]
1391 CALLE GEORGETTI-SAN JUAN PR
00909

DELGADO HERNANDEZ, PEDRO
AMERICAN INTERNATIONAL PLAZA-SUITE 800 250
AVE. MUNOZ RIVER
SAN JUAN PR 00918-1813

WALKER MERINO. RAMON A.
P.O BOX 9023550-SAN JUAN PR
00902-3550

San Juan, Puerto Rico, on April 26, 2005
Aida Ileana Oquendo Graulau
Clerk of the Supreme Court
Bethzaida Torres Morales Assistant Clerk

	PARTIDO POPULAR DEMOCRÁTICO	PARTIDO NUEVO PROGRESISTA	PARTIDO INDEPENDENTISTA PUERTORRIQUEÑO	NOMINACIÓN DIRECTA (WRITE IN)
				Se provee este espacio en blanco para que el elector anote en ella el nombre de cualquier otro candidato que tiene derecho, fuera de los que aparecen en las columnas anteriores. (Artículo 5.011 - Ley Electoral)
1	Gobernador de Puerto Rico Aníbal Acevedo Vilá	Gobernador de Puerto Rico Pedro Rosselló	Gobernador de Puerto Rico Rubén Berríos Martínez	Gobernador de Puerto Rico
2	Comisionado Residente Roberto L. Pico Pelosso	Comisionado Residente Luis Fortuño	Comisionado Residente Edwin Irizarry Mora	Comisionado Residente

INSTRUCCIONES SOBRE LA FORMA DE VOTAR EN LA PAPELETA ELECTORAL ESTATAL

En esta papeleta, usted tiene derecho a votar por un candidato a Gobernador y un candidato a Comisionado Residente.

COMO VOTAR INTEGRO

Para votar íntegro, usted hará una sola marca (X) válida, en el espacio en blanco bajo la insignia del partido de su preferencia y no hará ninguna otra marca en la papeleta.

COMO VOTAR MIXTO

Para votar mixto, se hace una marca (X) válida debajo de la insignia del partido de su preferencia y se hace una marca al lado de otro candidato fuera de la columna de su partido, o escribe el nombre de otra persona de su preferencia bajo el cargo correspondiente, en la última columna de Nominación Directa. Tenga en cuenta que sólo puede votar por un (1) candidato a Gobernador y por un (1) candidato a Comisionado Residente.

COMO VOTAR CANDIDATURA

Cuando el elector no tiene interés en votar bajo la insignia de ningún partido y desea votar exclusivamente por candidatos, hará una marca (X) válida al lado del candidato o los candidatos de su preferencia, o puede votar por otras personas de su preferencia que no aparezcan como candidatos, escribiendo sus nombres bajo el cargo correspondiente en la columna de Nominación Directa. Tenga en cuenta que sólo puede votar por un candidato para Gobernador y un candidato para Comisionado Residente.

COMISIÓN ESTATAL DE ELECCIONES

A - 91 -